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Supreme Court U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CARL ZIMMERMAN — PETITIONER

V

PONTOTOC COUNTY, MISSISSIPPI; BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY, ET AL.; UNITED STATES FIDELITY AND GUARANTY COMPANY; STATE OF MISSISSIPPI; ATTORNEY GENERAL; AND DISTRICT ATTORNEY CIRCUIT COURT DISTRICT ONE — RESPONDENTS

On Petition for Writ of Certiorari
To the Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

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11488

QUESTIONS PRESENTED FOR REVIEW:

WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE STATE DEFENDANTS MOTION TO DISMISS

WHETHER THE STATE DEFENDANTS ARE IMMUNE FROM SUIT PURSUANT TO MISS. CODE ANN. §11-46-9.

WHETHER THE CIRCUIT COURT LACKED JURISDICTION OVER THE AMENDED COMPLAINT

WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE PONTOTOC COUNTY DEFENDANTS AND USF&G SUMMARY JUDGMENT

WHETHER ALL LAWS THAT DO NOT CONFORM TO THE MISSISSIPPI CONSTITUTION SHOULD BE DECLARED UNCONSTITUTIONAL

WHETHER THE PETITIONER SHOULD BE GRANTED THE PRECISE RELIEFS SOUGHT

The following are referred to as "ET AL." in the caption: Pontotoc County, Mississippi, Board of Supervisors, their attorney and Clerk collectively and/or individually et al.

Term of Office – 1992 through 1995, Inclusive:
K. Herring, President and Member, First District
B. N. Simmons, Vice President and Member, Fifth District
L. Benjamin, Member, Second District
J. Pennington, Member, Third District
J. Roye, Member, Fourth District
C. Thomas, Attorney for Board, Until September 28, 1992
P. Tutor, Attorney for Board, from October 1, 1992
R. Collums, Clerk of Board and as Chancery Clerk

Term of Office – 1988 through 1991, Inclusive
K. Anderson, President and Member, Third District
L. Benjamin, Member, Second District
K. Herring, Member, First District
J. R. Seale, Member, Fourth District
B. N. Simmons, Member, Fifth District
C. Thomas, Attorney for Board
R. Collums, Clerk of Board and as Chancery Clerk

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JURISDICTION

The unpublished Opinion of the Mississippi Supreme Court sought to be reviewed was entered September 17, 1998, Appendix A. The Petition for Rehearing was denied December 3, 1998, Appendix B. Judgment was entered December 10, 1998, Appendix C. Petition for Writ of Certiorari is due March 3, 1999.

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the Opinion and judgment of the Supreme Court of Mississippi is 28 U.S.C.A. §1257(a). The Amended Complaint, being an action in state courts, the Mississippi Constitution's equivalent of the 14th Amendment to the United States Constitution was used in deference to the 14th Amendment. This is Article 3, Bill of Rights, Section 24 p. 6.

Section 24 is first mentioned in paragraph (11), page 3, of petitioner's Rebuttal to Defendants' Defenses and Responses to the Amended Complaint. Section 24 is invoked 32 more times in pleadings previous to this Petition. When it was realized that the court had no intention of permitting the Rebuttal to be presented, Motion was made to Present the Rebuttal, Appendix D, on April 21, 1997. This motion was ignored by the circuit court.

On August 30, 1997, petitioner moved the Supreme Court of Mississippi to modify the record on appeal by the inclusion of the Rebuttal and other pertinent documents to the appeal. On September 18, 1997, the Motion was amended to include specific reasons for the Motion. On October 22, 1997, the Supreme Court of Mississippi denied the inclusion of the relevant documents. Petitioner's Motion and Amendment thereto and Court order denying the inclusion of relevant documents is attached as Appendix E.

Lower court's preventing petitioner's rebuttal to all defendants responses to the Amended Complaint; and the Supreme Court of Mississippi's denial of its inclusion in the record on appeal, and other actions in this case relative to the first four questions is a denial of and a violation of petitioner's right to prosecute the Amended Complaint and also a denial of Petitioner's 14th Amendment to the United States Constitution's equal protection under the laws right.

The transition from Section 24 to the 14th Amendment came about in the Opinion of the Supreme Court of Mississippi relative to Count 12 of the Amended Complaint. In the Opinion, Appendix A, the Supreme Court of Mississippi ruled against petitioner referring to the Mississippi Constitution, Article 6, Judiciary, Section 176, p. 22. This Section was ruled unconstitutional by a federal court. This is all chronicled on pp. 22 and 23 of this petition. Evidently the Supreme Court of Mississippi does not recognize a federal court's ruling that Section 176 of

the Mississippi Constitution is unconstitutional in that it violates the equal protection under the law provision of the United States Constitution, the 14th Amendment thereto.

The actions of the Supreme Court of Mississippi, in the Amended Complaint, indicate they have so far departed from the accepted and usual course of judicial proceedings and has sanctioned such an action by a lower court as to call for the exercise of the Supreme Court of the United States' supervisory power.

Citations to Authority, both cases and statutes, are quoted at their first mention in the text of the Petition. To avoid repetition, as admonished in the Rules, reference will be made thereto when such authorities are again mentioned.

Brief quotations are included in the text. Lengthy quotations will be included verbatim in the Appendix, but reference to the authority will be cited in the text. In voluminous quotations the authority will be cited in the text and are not included verbatim in the Appendix, however a note they are not included at this time is made in Appendix V.

STATEMENTS OF THE CASE

An original complaint was filed June 13, 1995; however, service of process thereon was quashed. An Amended Complaint was filed January 25, 1996, expanding the scope of the complaint both as to content and the number of defendants. Both the original and Amended Complaint were brought as a constitutional right granted and guaranteed by the Mississippi Constitution, Article 3, Bill of Rights, Section 25, p. 6. As the case progressed other constitutional provisions were added which are enumerated in the text of this petition. The Amended Complaint has its parallels drawn from *Ex parte Young, 209 U.S. 123, 124*. Petitioner suffered injuries as shown on the first page of Appendix F which are evidence of his standing. While the injuries suffered pale in comparison to the cost to pursue this case, and the precise reliefs sought are quite substantial, it dawned upon the petitioner that they presented the vehicle to challenge the constitutionality of laws in question herein. This does not appear to have been done since the adoption of the Mississippi Constitution, November 1, 1890.

Pontotoc County defendants responded to Amended Complaint, moved for summary judgment with brief and Petitioner responded thereto. Pontotoc County defendants made Motion to Strike. Petitioner responded thereto. USF&G defendant responded to Amended Complaint and filed Joinder in Motion and Brief of Pontotoc County defendants. Petitioner filed response to Joinder in Motion. Order issued

granting summary judgment to both Pontotoc County and USF&G defendants.

State defendants responded to Amended Complaint and made Motion to Dismiss with brief. Petitioner responded thereto. Order of Court granting Motion to Dismiss. Petitioner filed Motion to Amend Dismissal Order which was denied. Petitioner filed Notice of Appeal to Mississippi Supreme Court and moved for modification of the record on appeal. Motion approved in small part, denied in major part. Petitioner filed appeal brief which was responded thereto by Pontotoc County and State Defendants. USF&G filed Joinder in Pontotoc County appeal brief. Petitioner filed reply briefs. Court issued Opinion in favor of all defendants. Petitioner filed Petition for Rehearing which Pontotoc County and USF&G defendants requested denial thereof. Court denied petition for Rehearing. Court issued Judgment confirming opinion.

FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

The following facts are reflective of the claims made in the various counts of the Amended Complaint, all of which are improbities in office by Pontotoc County and state defendants. Both the circuit court and the Mississippi Supreme Court did not consider these facts for the disingenuous reasons stated in the Opinion. The numerical/alphabetical identification is the same as the corresponding count in the Amended Complaint, all of which are violations of the Constitutional Section 268 Oath of Office, p. 6:

1 - A: Pontotoc County defendants did not attempt to resolve disputed billings in a reasonable time.

1 - B: The hearing officer did not provide for the hearing to be recorded verbatim.

1 - C: The hearing officer did not make the required determination.

1 - D: The hearing officer made a determination based on hearsay information, there being no record of Attorney General Opinion No. 266-D in County records, then made that determination retroactive.

1 - E: The hearing officer did not submit the required determination to the full board along with the record of the hearing, none having been made.

1 - F: The Pontotoc County board of supervisors order of February 28, 1995 is not in accordance with Miss. Code Ann. §17-17-61; in addition a copy of the order was not made available to plaintiff.

2 - A: Failure to make all necessary rules and regulations relative

to the collection and disposal of solid waste.

2 - B: Failure to timely establish and publish rates for the collection and disposal of solid waste.

2 - C: Advertised for proposals/bids to pickup and dispose of solid waste without establishing the necessary rules and regulations therefor, and did not take final action on proposals/ bids.

2 - D: Advertised for bids on 5 trucks and beds to be operated by County without taking final action on proposals/bids mentioned in 2 - C.

2 - E: Executed a lease/purchase agreement for 5 trucks and beds when only 4 trucks and 5 beds were specifically approved for purchase,

2 - F: Executed above lease/purchase agreement without the required receiving reports in County records.

2 - G: The following actions were not timely made in connection with County's pickup and disposal service of solid waste: approval of employes; purchase of truck tags; imposition of fee to be paid by all county residents whether or not they were a user of the service with a September 4, 1994, effective date; provided for investigation of circumstances when no solid waste was generated to remove such location from billing system.

3 - A: Failure to keep at or below the maximum tax rate authorized by law.

4 - A: Notice of intent to increase taxes not properly advertised.

5 - A: Noncompliance with tax levy resolution.

7 - A: Failure to make and submit required resolution for Three Rivers Solid Waste Management Authority to designate geographical area within which the collection, transportation, storage, processing and disposition of all solid waste generated within such area shall be accomplished.

7 - G: Failure to record votes by individual member of any votes taken.

7 - H: Failure to post notices of recessed meetings.

8 - A: Failure to attach required exhibit to their own resolution.

8 - B: Replaced agreement in Minutes without a motion, support, or a record of votes taken.

9 - C: Approved payment of invoices in excess of contracted amount.

9 - E: Failure to attach "Scope of Services" agreement to a contract.

10 - A: President of Board of Supervisors is serving on executive board of an agency having continuing contracts with the county, a conflict of interest.

10 - B: Attorney for Board is also serving as attorney for an agency having continuing contracts with the County, a conflict of interest.

11 - A: Attorney for Board serving in judicial department and executive department of government concurrently.

11 - B: President of Board serving in judicial department and executive departments concurrently.

12 - A: Board of Supervisors perform exclusively duties of executive/legislative magistracy while being a part of the judicial department.

13 - A: One example of improbity in office (13 - B) is issuance of opinion which is also manifestly wrong and without substantial support.

13 - B: Attorney General and district attorney continue to perform duties of the executive department magistracy.

14: USF&G is the surety for Pontotoc County defendants with the exception of the attorney for the board who did not take the oath of office and is not bonded.

These last three facts were added as the case progressed:

State defendants are spending funds appropriated for the ordinary expenses of the judiciary to execute powers and duties of the executive department.

Most laws carried forward to the Mississippi Code of 1892 relative to the attorney general, district attorney and boards of supervisors were not conformed to the Constitution as required by Section 278, p. 8 and therefore are unconstitutional.

Most laws enacted after the Constitution was adopted do not conform to the Constitution are unconstitutional as the legislature was remiss in recommending an amendment to the Constitution so they could have something in the Constitution they could conform to. This appears to have not been done as it would give the people control over the tendency to expand the role of government.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Amended Complaint is about enforcing the provisions of the Mississippi Constitution through the prosecution of officials for improbities in office, which, seldom if ever, is done by agencies of government in Mississippi empowered to do so. This is in connection with solid waste laws; the oath of office taken, and to test the constitutionality of laws. Particular caution is taken to prevent defendants from invoking the principles of "res judicata" and "collateral estoppel" in planned future actions. Constitutional Article 14, General Provisions:

"Section 268. All persons elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe to the following oath: "I,_____, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the state of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of _____; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God."

Note the precedence in the oath of office as to the state of Mississippi: Faithfully support the Mississippi Constitution is first; obey the laws of Mississippi is second; and faithfully discharge the duties of office is third.

Petitioner has both standing and the right to do these things and is acting in his own behalf. The right to so act is granted and guaranteed by the Mississippi Constitution, Article 3, Bill of Rights:

"Section 24. All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

"Section 25. No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both."

To be noted is the fact that these provisions do not specify a time frame in which to act; do not exempt officials from their provisions; and with the insertion of the second set of the words "shall be" in Section 24 in the Constitution of 1890, require justice to be administered without regard to person or effect as all persons appearing before a court are to be considered equal.

Saxon v Harvey 223 So.2d 623 (Miss. 1969):

'Sections 24 and 25 of the Mississippi Constitution constitute a separate and distinct classification of legal authority vested in citizens and taxpayers for apparent purpose of preventing or correcting improbities in office.'

This is confirmed in *Schlesinger v Reservists to Stop the War 418 US 227 (1974):* "The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."

The Mississippi Rules of Civil Procedure do not recognize "this separate and distinct classification of legal authority and are therefore unconstitutional in this regard."

The intent of the Amended Complaint is to restore the preeminence

of the Mississippi Constitution to its rightful place in the hierarchy of laws.

WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE STATE DEFENDANTS' MOTION TO DISMISS

When the delegates to the Constitutional Convention of 1890 adopted a new and unique Distribution of Powers Article as the first and primary Article of the Constitution, they mandated the absolute separation of powers as they deleted the previous exception clause that was contained in other Mississippi Constitutions and inserted a self-executing penalty clause:

> "Section 1. The powers of government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative to one, those which are judicial to another; and those which are executive to another.
>
> "Section 2. No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments, shall, of itself, and at once, vacate any and all other offices held by the person so accepting in either of the others."

The offices of attorney general, district attorney, and boards of supervisors remain in the Judiciary, where they had been in previous constitutions with the exception clause. When that clause was deleted during the Constitutional Convention of 1890, the offices of attorney general and district attorney should have been made a part of the executive department; and the office of boards of supervisors should have been reconstituted in strict accordance with the mandatory separation of powers, in a county government with legislative, judicial, and executive departments, but this was not done.

The three member commission appointed to conform the laws of Mississippi to its new Constitution as required by Section 278 thereof, should have realized the laws relative to the offices of attorney general, district attorney, and boards of supervisors could not be conformed to the mandated absolute separation of powers article of the new Constitution. All laws enacted prior to the 1890 Constitution as to the offices of attorney general and district attorney were of the executive department magistracy. All but ten laws enacted prior to the 1890 Constitution as to the office of boards of supervisors were of the legislative and/or executive department magistracy or administrative in nature. That the other laws relative to these offices could not be conformed to

the new Constitution is due to the fact that these offices remain as a part of the Judiciary in the 1890 Constitution, and as such are unconstitutional.

Because of the many changes made to the Constitution in the Constitutional Convention of 1890, a new provision was inserted in Article 15, Amendments to the Constitution:

> "Section 278. The governor shall, as soon as practicable, appoint three suitable persons, learned in law, as commissioners whose duty it shall be to prepare and draft such general laws as are contemplated in this Constitution, and such other laws as shall be necessary and proper to put into operation the provisions thereof and as may be appropriate to conform the general statutes of the state to the Constitution. Said commissioners shall present the same, when prepared to the legislature at its next regular session; and the legislature shall provide reasonable compensation therefor."

This section is unique to the Mississippi Constitution. By manifest implication all future laws enacted by the legislature also have to conform to the Constitution. The Commission should have recommended that the delegates to the Constitutional Convention of 1890 be reconvened to do as recommended on p. 7 but this was not done. Instead the Commissioners went about their tasks as if there were no changes, to the Distribution of Powers Article, p. 7.

Section 278 is properly placed in the Constitution under Article 15, Amendments to the Constitution. An amendment to the constitution is necessary in order for laws enacted to have something to conform to.

People in government do make mistakes, but government is not entitled to those mistakes. Petitioner, in the Amended Complaint is doing what should have been done over 108 years ago.

There have been multitudes of opportunities early on and in the years since the Constitution of 1890 was adopted that the legislature could have recommended an amendment to the Constitution to properly place these three offices in the Constitution; or could have made it possible through a recommended constitutional amendment for a constitutional convention to be convened to correct the deficiencies in the 1890 Constitution, but this was not done.

That all legislators should know or should have known of the deficiencies in the Mississippi Constitution of 1890 is evident in the oath of office they are required to take as prescribed in Constitution Article 4, Legislative Department:

> "Section 40 (in part): that I will, as soon as practicable hereafter, carefully read (or have read to me) the Constitution of this state, and will endeavor to note, and as a legislator to execute, all the

requirements imposed on the legislature."

The Mississippi Legislature's Judicial advisory Study Commission did not act on Petitioner's request relative to the offices in question as contained in Petitioner's letter, Appendix G.

In *Dye v State ex. rel. Hale 504 So.2d 332 (Miss. April 29, 1987)* in which offices of attorney general and district attorney were not at issue, footnote 20 was inserted which is quoted in the Opinion under this same question. The footnote appears to be a precursor to the enactment of the Mississippi Executive Reorganization Act of 1989, Miss. Code Ann. Title 7, Chapter 17.

The legislature of the State of Mississippi committed the unconstitutional act of taking the office of attorney general out of the judiciary and placing it as the third office of the executive department, Appendix H. This is in violation of the Distribution of Powers Article, p. 7. The office of district attorney is similarly situated as the office of attorney general and as such was made a defendant in the Amended Complaint. All actions of these two offices since November 1, 1890, are therefore unconstitutional.

The legislature is authorized to define duties and powers of the various officers of the state by Constitutional Article 4, Legislative Department Miscellaneous:

> "Section 103. In all cases, not otherwise provided for in this Constitution, the legislature may determine the mode of filling all vacancies, in all offices, and in cases of emergency provisional appointments may be made by the governor, to continue until the vacancy is regularly filled; and the legislature shall provide suitable compensation for all officers, and shall define their respective powers."

The Constitution provides in Article 5, Executive: "Section 123. The governor shall see that the laws are faithfully executed." The legislature has continually failed or refused to fund this constitutional duty of the governor; instead by Miss. Code Ann. §7-5-1 (in part) the legislature has defined this executive duty to the office of attorney general, a part of the judiciary, contrary to the Distribution of Powers Article, p. 7. "He shall be the chief legal officer and advisor to the state, both civil and criminal" etc., Appendix H.

The legislature may not change those powers and duties defined for the various constitutional offices in the Constitution, and in defining other powers and duties, must comply with the Distribution of Powers Article, p. 7.

The legislature cannot change the Constitution, either actually or in effect, without the authorization of the people regardless of the reason or need therefor. *Frasier v State by and Through Pittman 504 So.2d*

675 (Miss. March 4, 1987): "The legislature may not change the Constitution without the authorization of the people. Further this court is without power to amend the Constitution." Note the date of the *Frasier* decision, it was made less than two months before the *Dye* decision with the footnote.

Both the foregoing and the following are in agreement with Constitutional Article 3, Bill of Rights:

> "Section 6. The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided such change be not repugnant to the Constitution of the United States."

The right to initiate constitutional amendments was denied for 71 years, from 1922 to 1993. The process in place now borders on being the same as if this right was still denied. In a conversation with the Department of Justice attorney who was reviewing Miss. Code Ann. §23-17-1 et seq., Amendments to Constitution by Voter Initiative for preclearance in accordance with the Voting Rights Act of 1965, as amended, she stated: 'This is the worst piece of legislation ever received here for review. It is equally bad for everyone, and as such it does not discriminate against anyone.'

At this point, it is appropriate to recall the history of Constitutional Conventions and Constitutions in Mississippi. The people did not ratify the first Constitution of 1817. The only way that Constitution could be amended was by a Constitutional Convention. One was called which resulted in the Constitution of 1832. That Constitution provided for the legislature to recommend amendments to the Constitution. Again, that Constitution was not submitted to the people for ratification. In order to be readmitted to the Union of States after secession and the Civil War, a new constitution for Mississippi was mandated. A Constitutional Convention was called in 1867. The Constitution that convention recommended was rejected. Almost immediately, another convention was convened, and the work product of that Convention was also rejected.

President Grant called the proponents and opponents of a new constitution to Washington, D.C. where provisions of a new Constitution were agreed to piecemeal. As they were agreed upon, the provisions were returned to Mississippi where the media of that day publicized them. After they were all publicized, an election was held for ratification and this time a Constitution was adopted. There appears to be no record of any challenge to the legality of a Constitution being submit-

ted for ratification that was not framed by a Constitutional Convention.

The precedent having been set for ratification by the electorate, a Constitutional Convention, after many attempts, was called to convene August 12, 1890. The foregoing precedent having been set to submit new Constitutions to the electorate for ratification was abandoned by the delegates to the 1890 Convention. Early on, the delegates indicated in a vote taken that a majority were in favor of not submitting their work product to the people for ratification. The delegates, many of whom were elected or appointed public officials, having been unfettered, proceeded to adopt a Constitution to their liking. The cover to the latest publication of the Constitution of 1890 which was printed August 1, 1976 states: Adopted by the people in a Constitutional Convention, November 1, 1890, at Jackson. To the uninitiated, this seems to indicate that the people adopted that Constitution. Appendix I, excerpts from the autobiography of Robert Harvey Thompson, seems to be the only record found which, in plain language, reveals the main reason for the Constitutional Convention of 1890, and why the delegates adopted the constitution that convention produced rather than submitting it to the people for ratification. Since the 1817 Constitution, no Constitution has included a provision for a Constitutional Convention, or even a provision that can be liberally construed to call for a Constitutional Convention.

The Mississippi Supreme Court further stated, relative to the requirement all constitutional amendments are to be authorized by the people, in *Chevron U.S.A., Inc. v State 578 So.2d 644 (Miss. 1991)*:

> "The Mississippi Constitution, like that of the United States, is the supreme law within the range of its authority. It is an expression of the will of the people by whom it was passed and by whom it can only be altered. Obviously, as 'the highest known law,' the Constitution of Mississippi transcends the Solomonic concepts of fairness and equity on which the chancery court's decision was based."
>
> *Id. at 649:* "Another basic tenet of constitutional construction is that it is not possible to disobey, or to construe into nothingness, a provision of the constitution merely because it may appear to work injustice, or to lead to harsh or obnoxious consequences or invidious or unmerited discriminations. Even less weight should be attached to the argument that the constitutional construction will result in mere inconvenience."

This last quote is borrowed from *Talbott v Thomas 286 Ky. 786, 151 S.W.2d 1 (1941).*

The content of the footnote in *Dye* is in contrast with *Haley v State 108 Miss. 905 (1914)* where boards of supervisors were at issue. Boards of supervisors are also at issue in Count TWELVE of the Amended Complaint wherein the *Haley* decision is quoted: "By Section 170, Article 6, boards of supervisors are made a part of the judicial branch of the state." Section 170 reads:

> "Section 170 Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as "state highways," and place such highways under the jurisdiction of the state highway Commission, for construction and maintenance. The clerk of the chancery court shall be the clerk of the board of supervisors."

The *Haley* decision was made some 74 years before the *Dye* footnote and as such it is the settled and governing decision relative to the fact that Article labels and section numbers are determinative of which governmental department a government office belongs to. The contents of the Distribution of Powers article, p. 7, define the criteria for the make up of constitutional articles for the legislative, judicial and executive departments for without such, the provisions of this article cannot he enforced. This appears to be the basis for the *Haley* decision, which was omitted in the *Dye* footnote.

If by Article 6, Judiciary, Section 170, boards of supervisors are made a part of the judicial branch of the state, it follows that by the same article, Sections 173 and 174, the offices of attorney general and district attorney, respectively, are also made a part of the judicial branch of the state:

> "Section 173. There shall be an attorney-general elected at the same time and in the same manner as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney general shall be the same as herein prescribed for judges of the circuit and chancery courts."
>
> "Section 174. A district attorney for each circuit court district shall be selected in the manner provided by law, whose term of office shall be four years, whose duties shall be prescribed by law, and whose compensation shall be a fixed salary."

The Mississippi Supreme Court, by its previous decisions and the foregoing, leaves no doubt that the offices of attorney general and district attorney are a part of the Judiciary. In state defendants response to the Amended Complaint, they admit: "The offices of attorney general and district attorney are within the judicial branch of government in the Mississippi Constitution." This admittance has not been retracted. The state defendants did not plead they were a part of the executive department of the state. That they were was added by the Mississippi Supreme Court in their ruling against the petitioner, which is the epitome of the injustice they rendered to the petitioner.

The claims by petitioner in the Amended Complaint are that the offices of attorney general and district attorney continue to perform powers and duties of the executive magistracy while being a part of the judiciary which is in violation of the Distribution of Powers article, p. 7. One of such duties is the issuance of Opinion No. 266-D, Appendix J, which is manifestly wrong and without substantial support in that it in effect, changed the wording in Miss. Code Ann. §17-17-61, Appendix K, from: "if the owner or tenant of a real property failed or refused to pay the fees for collecting and disposing of garbage removed from the site of such real property" to "if the owner or tenant of a real property is a generator of garbage."

A third claim added as the case progressed is that constitutionally and by budgets and appropriations, the offices of attorney general and district attorney are a part of the judiciary, but by statute these offices are a part of the executive department. These offices are therefore spending funds budgeted and appropriated for the ordinary expenses of the judiciary to exercise powers and duties of the executive department, which is not an ordinary expense of the judiciary. Constitutional Article 4, Legislative Department: "Section 69 (in part). General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative and judicial departments of government."

These three claims are improbities in office, the first being not keeping the oath of office, page 5, to faithfully support the Constitution of Mississippi, Distribution of Powers article; the second by issuing an opinion which is manifestly wrong and without substantial support; and the third by spending money appropriated to the Judiciary to execute powers and duties of the executive department, which is not an ordinary duty of the judicial department.

Keeping the oath of office is a principal issue in the Amended Complaint. In *State ex rel Forman, Dist. Atty., v Wheatley et all Bd of Supervisors 113 Miss. 555 (1917)*, the Mississippi Supreme Court declared: 'boards of supervisors have the authority to contest the legality

of laws, which if followed, might cause them to violate their oath of office.' This should also be applicable to the offices of attorney general and district attorney who are supposed to be more learned in law than members of a board of supervisors, Evidently this was not done.

Because of the fact that the office of attorney general and district attorney are commonly thought of as belonging to the executive department of government, the legislature committed the unconstitutional act of changing the Constitution, in effect, by taking the office of attorney general out of the Judiciary and placing it as the third office of the executive department, Appendix H.

The Supreme Court of Mississippi, in its opinion, claims the office of attorney general is a part of the executive department by enactment of Miss. Code Ann. §7-5-1 et seq.; therefore, there was a failure by Petitioner to state a claim upon which relief could be granted as continuing to perform powers and duties of the executive department, one of which is issuing advisory opinions, are normal duties of the executive department.

The statutes relative to the office of attorney general, Miss. Code Ann. §7-5-1 et seq., and §25-31-1 et seq., relative to the office of district attorney are unconstitutional as these statutes define duties of the executive department magistracy to these offices which are constitutionally a part of the Judiciary. This is in violation of the Distribution of Powers article, p. 7. The above statutes have no force and effect as they are patently unconstitutional. Instead of so acting, the legislature should have, again, recommended a constitutional amendment for authorization by the people to properly place the offices of attorney general and district attorney in the executive department, but this was not done.

The *State v Southern Pine 205 Miss. 80 91; 38 So.2d 442, 447 (1949)*, and *Secretary of State v Wiesenberg 633 So.2d 983, 988 (Miss. 1994)* decisions assume the office of attorney general is a part of the executive department when such is not true, therefore these decisions are invalid.

The fact that Constitutional Article 6, Judiciary, Sections 173 and 174, p. 12, remain unchanged in the Constitution, but by statute these offices are a part of the executive department, appears to have come about by the efforts of the Mississippi Supreme Court and the legislature.

This renders Miss. Code Ann. §7-5-1 et seq., Appendix H, which places the office of attorney general in the executive department, unconstitutional as this statute does not conform to the Constitution as required in Section 278, p. 8.

Considering the foregoing, the Mississippi Supreme Court is de-

claring, in effect, that the legislature can change the Constitution without the authorization of the people which is contrary to their previous decisions in this regard and which is contrary to the Mississippi Constitution, Article 6, Bill of Rights, Section 6, p. 10.

This is just the first example where a state court of last resort has so far departed from accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court of the United States' supervisory power.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, the offices of attorney general and district attorney are constitutionally part of the Judiciary, therefore the petitioner did state a claim upon which relief could be granted. The circuit court erred in granting state defendants' Motion to Dismiss, and the Mississippi Supreme Court also erred in affirming that decision.

WHETHER THE STATE DEFENDANTS ARE IMMUNE FROM SUIT PURSUANT TO MISS. CODE ANN. §11-46-9

The issue that for the provisions of Title 11, Chapter 46, to be effective, the suit must have been brought under the provisions of this chapter is not moot as it has been proven by petitioner that there was no failure to state a claim upon which relief could be granted in arguments to the first question. In Title 11, Chapter 46, it is stated nine times "suits brought under the provisions of this chapter" or words to that effect. These nine times are contained in Appendix L:

1. §11-46-1(b)
2. §11-46-7(1)
3. §11-46-7(3)
4. §11-46-11(1)
5. §11-46-11(3)
6. §11-46-13(1)
7. §11-46-13(2)
8. §11-46-15(1)
9. §11-46-15(3)

That the suit must be brought under the provisions of this chapter is confirmed by the Mississippi Supreme Court decision in *Starnes v City of Vardaman 580 So.2d 733, 736 (Miss. 1991)*: "In order for the reduced period of time statutes of limitation to be in effect, the suit would have to be brought under the provisions of this chapter." This is applicable to all provisions of Title 11, Chapter 46.

There may be exclusive statutory remedies such as in Miss. Code Ann. §11-46-7(1) for any individual to recover damages from a government entity as compensation for injuries; but this is not the exclusive remedy. The constitutional remedy provided in Article 3, Bill of Rights, Sections 24 and 25, p. 6, takes precedence over and supersedes any statutory provisions as is confirmed in the hierarchy of laws.

When there are several options under which a suit can be brought, it is the prerogative of the plaintiff to choose the option believed to be

the most advantageous to him, so the petitioner chose the constitutional provisions. The provisions of Title 11, Chapter 46, are considered to be highly oppressive. Choosing to bring a suit under the provisions of Title 11, Chapter 46, requires the petitioner to surrender his constitutional right of a trial by jury, §11-46-13(1), Appendix L; and the inherent right to have government officials to keep and honor their oath of office which is given up in Miss. Code Ann. §§11-46-9(1)(a), (b), (d), (e) and (i), Appendix L.

As previously stated herein, the Amended Complaint was brought under constitutional provisions to prevent and correct improbities in office. That state defendants are not immune from suit pursuant to Miss. Code Ann. §11-46-9, Appendix L, is evidenced by:

1. The suit was not brought under the provisions of Title 11, Chapter 46, under which such immunity is granted.

2. The Mississippi Constitution grants only privilege from arrest in only three instances:

> "Section 48. Senators and representatives shall in all cases, except for treason, felony, theft, or breach of the peace, be privileged from arrest during the session of the legislature, and for fifteen days before the commencement and after the termination of each session."
>
> "Section 102 (in part). And the electors, in all cases except in cases of treason, felony, and breach of peace, shall be privileged from arrest during their attendance at elections and in going to and returning therefrom."
>
> "Section 220. The militia shall be exempt from arrest during their attendance on musters, and in going to and returning from the same, except in cases of treason, felony, or breach of the peace."

If the above can be considered immunities, they are the only immunities granted in the Mississippi Constitution. Other statutory immunities or other so called immunities are unconstitutional in that they do not conform to the Constitution as required by Section 278, p. 8, as there is nothing in the Constitution they can conform to.

3. The provisions of Title 11, Chapter 46, are unconstitutional as they do not conform to the Mississippi Constitution as is required in Section 278, p. 8, for there is nothing in the Constitution they can conform to.

4. The Supreme Court of Mississippi decisions also declared there is no immunity, common law, sovereign, Miss. Code Ann. §11-46-9, or any other kind of immunity applicable in this case in *Starnes v City of Vardaman 580 So.2d 733 (Miss. 1991)*: "Governmental immunity will not bar this suit as collection and disposal of garbage is a propri-

etary function rather than a governmental one." See opening paragraph on p. 5 of Argument Amplifying Reasons Relied on for Allowance of the Writ. *McQueen v Williams 587 So.2d 921 Miss. 1991)*: "Public officials of this state lose their immunity... when they substantially exceed their authority and commit wilful wrongs or malicious acts." Defendants in this suit are public officials who have wilfully committed improbities in office by violating their oath of office. *Tucker v Hinds County 558 So.2d 869 (Miss. 1990)*: "Calling on the doctrine of sovereign immunity is no defense where a violation of Constitutional rights is concerned." The constitutional right violated is the inviolate right of a jury trial denied by the circuit court which is granted in the Mississippi Constitution, Article 3, Bill of Rights:

> "Section 31. 'The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury."

The United States Constitution provides for jury trial in criminal cases, whereas the Mississippi Constitution provides the right of a jury trial in both criminal and civil cases. The actions of the circuit court denied petitioner this right." *State v Hinds County Board of Supervisors 558 So.2d 869 (Miss. 1994)*: "Mississippi law supports the proposition that no sovereign immunity existed when relief sought was that a particular statute was unconstitutional." See item 3 above.

This is an attempt to redefine actions against the defendants both by those defendants and the courts, to claim the Amended Complaint is something that it is not so it can be ruled on in accordance with statutes to prevent petitioner from prosecuting public officials for improbities in office, and to protect the "status quo" which has been established through similar actions such as are contained in this case by those in government including the courts in Mississippi.

This is the second example where a state court of last resort has so far departed from accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court of the United States' supervisory power.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, state defendants are not immune from suit pursuant to Miss. Code Ann. §11-46-9, therefore the circuit court erred in its order declaring they were, and the Supreme Court of Mississippi also erred in affirming that order.

WHETHER THE CIRCUIT COURT LACKED JURISDICTION OVER THE AMENDED COMPLAINT

A hearing eventually held February 28, 1995, was supposed to be held as prescribed in Miss. Code Ann. §17-17-61, Appendix K, to determine if petitioner failed or refused to pay the fees for collection and disposal of household garbage. Upon completion of the hearing, the hearing officer advised he would mail the decision, which was done that very same day. An appeal in accordance with Miss. Code Ann. §11-51-75, Appendix M, could not have been taken at that time as the decision received, Appendix N, was not a decision from the board of supervisors as prescribed in §11-51-75.

The questionable order of the board of supervisors, Appendix O, was not made available to the Petitioner. It was found by him in county records on May 2, 1995, the fifty-third day after the ten-day time to take an appeal had lapsed. An appeal also could not be taken at that time as an appeal, if taken, would have been rejected as not having been timely made.

Of all the statutes enacted since the effective date of the 1890 Constitution, November 1, 1890, the only duty of the judicial magistracy defined for boards of supervisors was Miss. Code Ann. §17-17-61, which was in effect from May 15, 1992, until it was repealed effective July I, 1994. It was expected that the hearing of February 28, 1995, would be with judicial decorum, but instead it was held as is evidenced by items 1 - A through 1 - F, p. 3.

Although §17-17-61 was repealed it is the operative statute until that date and its use is confirmed in *State ex rel, Pittman v Ladner 512 So.2d 1271 (1987)*:

> "In litigation between state and individual, where operative statute has been repealed or amended and litigation arises out of prerepeal, preamendment transaction or occurrence, individual may claim and be given the benefit of prior law in effect at operative time where he feels it more favorable to him."

The hearing held February 28, 1995, covered the period of time from May 21, 1993, through October, 1993.

The Supreme Court of Mississippi also attempts to redefine Count Six, Appendix P, as an appeal from a board of supervisors. Count Six is a request to the circuit court to rule on an expressed intent of the board. No appeal could be taken as "an expressed intent" is not a decision of a board of supervisors which is required by §11-51-75. This request has not as yet been responded to by the circuit court, nor the Supreme Court of Mississippi.

As argued in the foregoing, the circuit court could not have had jurisdiction under Miss. Code Ann. §11-51-75, requiring a bill of exceptions, as no appeal was made. In addition, Miss. Code §11-51-75 is unconstitutional in that the provisions thereof do not conform to the

Constitution as there is nothing in the Constitution that they can conform to do.

The circuit court, however, does have jurisdiction over The Amended Complaint as authorized in the Mississippi Constitution, Article 6, Judiciary, Sections 156, 159, 160 and 161, Appendix Q. The Amended Complaint was filed January 25, 1996, which for various reasons replaced the original complaint filed June 13, 1995. The Amended Complaint was brought in accordance with the Mississippi Constitution, Article 3, Bill of Rights, Sections 24 and 25, p. 6. These sections do not create a case for the Petitioner. They grant and guarantee his right to prosecute any civil cause in any tribunal in the state.

The Facts Material to Consideration of Questions Presented, p. 3, are mostly improbities in office, which is a principal issue in the Amended Complaint. Plaintiff has standing and the right to do this, p. 2. As to exclusive statutory remedies, see p. 15.

This is another attempt to redefine actions against defendants both by those defendants and the courts, to claim the Amended Complaint is something that it is not so it can be ruled on in accordance with statutes to prevent petitioner from prosecuting public officials for improbities in office, and to protect the "status quo" which has been established in Mississippi through similar actions such as are contained in this case by those in government including the courts.

This is the third example where a state court of last resort has so far departed from accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court of the United States' supervisory power.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, the circuit court does have jurisdiction over the Amended Complaint, therefore the circuit court erred in it order declaring they did not have jurisdiction, and the Supreme Court of Mississippi also erred in affirming that order.

WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE PONTOTOC COUNTY DEFENDANTS AND USF&G SUMMARY JUDGMENT

The circuit court granted Pontotoc County defendants summary judgment and dismissal because of their claim petitioner had failed to present "genuine issues of material fact" in the Amended Complaint against these defendants as a matter of law. Such is not the case.

The "Facts of the Case" presented to both the circuit court and the Supreme Court of Mississippi by Pontotoc County defendants were mostly excerpts from the "background" portion introducing the

Amended Complaint. These misstated facts were accepted by the courts over the objection of the petitioner.

As argued by petitioner in previous pleadings, the Annotated Code of Mississippi Index and the Mississippi Constitution were thoroughly researched which resulted in the words "genuine issues of material fact" are not either singularly or in any combination thereof, in the context used by Pontotoc County defendants and the courts found therein. The same applies to the words "summary judgment", "dismissal", and "as a matter of law." There can be none of the above things when there are no such words or provisions in the Annotated Code of Mississippi or in the Mississippi Constitution.

The provisions of Title 11, Civil Practice and Procedure which call for an action in accordance therewith usually requires a hearing before an administrative agency or board from which an appeal can be taken to a circuit or chancery court, sitting as an appellate court without a jury. This is in violation of the constitutional right of a trial by jury, Section 31, p. 17.

The facts of the Amended Complaint as to these defendants are restated in "Facts Material to Consideration of Questions Presented" p. 3. Each of these facts were proved in the various exhibits to the Amended Complaint, and each meets with the definition of "genuine issue" or "material fact" in Words and Phrases, as these four words together are not found therein.

The numerical/alphabetical identification of each fact or improbity identifies the corresponding count in the Amended Complaint. Details of these facts or improbities in office are contained in the various counts, arguments thereto, reliefs requested or in subsequent pleadings of petitioner. Neither the circuit court nor the Supreme Court of Mississippi acknowledged these were the facts of the case in ruling against petitioner.

The Supreme Court of Mississippi's arguments as to these facts in its opinion are rebutted by petitioner as follows:

Counts 1 - A through 1 - F and Count 6. These counts were adjudged as an appeal from a decision of a board of supervisors, but such was not the case as argued by the petitioner in the previous question and are not repeated here.

Counts 2 - A through 2 - G; Count 5; Counts 7 - A, G and H; Counts 8 - A and B; and Counts 9 - C and E are not subject to the various provisions and immunities of Title 11, Chapter 46, for the various reasons stated on p. 15, 16, 17, of the second question.

Counts 3 - A and 4 - A are for improbities in office committed by Pontotoc County defendants in connection with the levy of taxes and are not a challenge to the assessment of taxes, therefore the provisions

of Miss. Code Ann. §11-51-77, Appendix M, do not apply in this case. This section is unconstitutional in that it does not conform to the Constitution of Mississippi as required in Constitutional Section 278, p. 8, as there is nothing in the constitution that it can conform to.

Counts 10 - A and B; Counts 11 - A and B are not "quo warranto" actions, Miss. Code Ann. §§11-39-1, 11-39-3, Appendix L, as the petitioner does not lay claim to these offices. The provisions of Miss. Code Ann. §§11-39-1 and 11-39-3 are unconstitutional in that they do not conform to the Constitution as there is nothing in the Constitution that they can conform to. These counts involve improbity, conflict of interest, in office by the persons involved, which petitioner has both standing and the right to prosecute, p. 2. That the president of and the attorney for the board should keep the last offices accepted in a particular department is in accordance with the Mississippi Constitution, Article 1, Distribution of Powers, Section 2, p. 7.

All counts above, with the exception of Count 1 involve duties of the legislative and/or executive department magistracies. In performing these duties, the persons so performing them, are in violation of the mandated absolute separation of powers. See p. 13, relative to the Wheatley decision.

Count - 12. With the absolute separation of powers mandated, the words in Article 6, Judiciary Section 170, p. 12, relative to "roads", "ferries", "bridges", and "other duties" take on the meaning "of the judicial department only".

To avoid repetition, the petitioner's statements, p. 7 relative to boards of supervisors are by this reference considered to be quoted herein in their entirety as to words and figures.

When the three-member commission was performing its duties as required by Section 278, p. 8, all laws of the state relative to boards of supervisors were not conformed to the Constitution. Of some 217 laws acted on by the Commission only ten could be considered of the judicial department magistracy, all other being of the legislative and/or executive department magistracies, or administrative in nature. Only four of these ten laws remain today, Miss. Code Ann. §§19-3-23, 19-3-39, 19-3-51, and 19-3-53, Appendix R. With boards of supervisors still being a part of the Judiciary, see *Haley*, p. 12, therefore, boards of supervisors, in performing other duties as prescribed in Miss. Code Ann., wherever they appear, this is, in a majority of cases, in Title 17 and Title 19, Chapters 3 and 5, which are in violation of the Distribution of Powers Article, p. 7, and their oath of office; Titles 17 and 19 are unconstitutional. See the *Wheatley* decision p. 13.

All actions of boards of supervisors since November 1, 1890, the effective date of the Constitution of 1890, that are not of the judicial

department magistracy are therefore unconstitutional. This includes just about all their actions.

Contrary to the above, in its Opinion the Supreme Court of Mississippi adjudicated there has been no violation of the absolute separation of powers mandated by the Distribution of Powers article by Pontotoc County defendants and in support thereof quoted the footnote in *Dye v State ex rel. Hale 507* So.2d 346 n. 20 (Miss April 29, 1987) which states:

> "Moreover, qualifications for membership on a county board of supervisors are provided for in the "Judiciary" (Art. 6, §176) but this does not exclude supervisors from the exercise of legislative, executive or administrative functions."

Paraphrasing this statement, boards of supervisors can do anything not excluded in Section 176, which appears to be unlimited in its scope. This Section reads:

> "Section 176. No person shall be a member of the board of supervisors who is not a resident freeholder in the district for which he is chosen. The value of real estate necessary to be owned to qualify persons in the several counties to be members of said board shall be fixed by law,"

The Supreme Court of Mississippi continues to search for something that can be used for justification that boards of supervisors can perform legislative and/or executive functions, has no basis for this declaration except perhaps as a precursor to the legislature's enactment of the County Government Reorganization Act of 1988, of which Miss. Code Ann. §19-3-40 is the cornerstone, Appendix R. The Supreme Court of Mississippi has once again come up empty handed. The use of Section 176 is fatally flawed in the Supreme Court of Mississippi's attempt to maintain the "status quo" for Pontotoc County defendants as they did not plead this footnote in their pleadings. *Dye* was decided almost two full years after *Williams v Adams County Bd. of Elections 608 F. Supp. 599(D.C. Miss. May 4, 1985)* was decided by the U.S. District Court, Jackson Division, which declared:

> "Accordingly it is the determination of this court that Article 6, Section 176 of the Constitution of the State of Mississippi and Miss. Code Ann. §19-3-3 (1972) are unconstitutional being in violation of the equal protection clause of the Constitution of the United States."

This case is cited in supplement to Volume 1 of Miss. Code Ann. under Section 176, There is no reason the Supreme Court of Mississippi did not know, or should have known, Section 176 was unconstitutional, yet this was used by them to rule against petitioner. This

indeed is a very questionable action by the Supreme Court of Mississippi.

Miss. Code Ann. §19-3-3 read:

"§19-3-3. Eligibility of supervisors.

"A person shall not be a member of the board of supervisors who is not a resident freeholder in the district for which he is chosen, and the owner of real estate of the value of one thousand five hundred dollars."

Judicial decisions following this statute also refer to the unconstitutionality of this statute.

Count 14. This count brings United States Fidelity and Guaranty Company as a defendant to the Amended Complaint as the surety for Pontotoc County Defendants with the exception of the attorney for the board. There is no record of the attorney taking the oath of office or being bonded.

This is the third attempt to redefine actions against defendants both by these defendants and the courts, to claim the Amended Complaint is something that it is not so it can be ruled on in accordance with statutes to prevent petitioner from prosecuting public officials for improbities in office, and to protect the "status quo" which has been established in Mississippi through similar actions such as are contained in this case by those in government including the courts.

This is the fourth example where a state court of last resort has so far departed from accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court of the United States' supervisory power.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, the circuit court erred by granting the Pontotoc County Defendants and USF&G Summary Judgment, and the Supreme Court of Mississippi also erred in affirming that decision, therefore the Supreme Court of the United States is respectfully requested to grant this Petition for Writ of Certiorari.

WHETHER ALL LAWS THAT DO NOT CONFORM TO THE MISSISSIPPI CONSTITUTION SHOULD BE DECLARED UNCONSTITUTIONAL

The decision to file the Amended Complaint came about when Petitioner realized it would not only present the opportunity to remedy injuries suffered, but would also enable the challenging of laws believed to be unconstitutional; restore the preeminence of the Mississippi Constitution to its rightful place in the hierarchy of laws, and

perhaps enable the calling of a Constitutional Convention to correct the deficiencies in the current Constitution.

Rather than being a living document, it maintains the "status quo" of the late 1880's by requiring that all laws are to conform to the Constitution of 1890.

The above seems to be evidenced in the excerpts from the Autobiography of Robert Harvey Thompson, an attorney who was a delegate to the Constitutional Convention of 1890, Appendix I. The complete autobiography is available under Call No. Z-1067 in the Mississippi Department of Archives and History Museum in Jackson, Mississippi.

Mr. Thompson became the Chairman of the Convention's Legislative Committee, and later served as Chairman of the Convention's Revision Committee whose duty it was to correct the conventions verbiage and resolve conflicts in the various constitutional provisions approved for the proposed new Constitution. Mr. Thompson was also appointed Chairman of the three-member Commission to perform the tasks mandated by Section 278, p. 8. Undoubtedly, Mr. Thompson's impact on the Constitution of 1890 was more than just "quite substantial".

In contrast to Mississippi's limited Constitution is the Constitution of Colorado which has a provision in Article 17(4), which deals with their people's initiative: "This section shall not be construed to deprive the general assembly of the right to enact any measure." In *People ex rel Tate v Provost 55 Colo. 1991 134 P 129 (1913)* wherein there was a challenge to an act of the general assembly, it was not allowed citing the foregoing provision.

Mississippi's Constitution has no such provision or a provision that can be construed to be such a provision, in fact Section 278, page 8, works in the opposite field, mandating that all laws are to conform to the Constitution of 1890, which severely limits what the legislature can do. In order to conform to the Constitution, before any new law is enacted, an amendment to the Constitution, authorized by the people, is required so the proposed new law would have something to conform to upon enactment.

In *State v Wood 187 So.2d 820 (Miss. 1966)* the Supreme Court of Mississippi declared:

> "The legislature has the power to enact any law it sees fit, be it sincere or hypocritical, moral or immoral, wise or foolish, beneficial or harmful, providing it does not violate the State or Federal Constitution."

There is nothing wrong with that decision, but in practice the legislature takes advantage of the first part of this decision and ignores the last ten words. The Constitution of Mississippi is violated when a law

is enacted which does not conform thereto. Until the Amended Complaint was initiated by petitioner, there has been no enforcement of constitutional provisions or challenge to the enactment of laws that do not conform to the Constitution. Shepard's Mississippi Citations does not show Section 278 as having been the subject of any litigation. Those offices which should have enforced the provisions of the Constitution or challenged such laws would not, and could not if they would, do so because enforcement of laws is a core responsibility of the offices of executive department of government, and the attorney general and district attorney remain a part of the Judiciary in the Constitution of 1890.

All things, a part of life today, but not existing in 1890, on which laws were enacted, as a "Rule of the Thumb" are unconstitutional as they do not conform to the Constitution as required by Section 278, p. 8, as there is nothing in the Constitution they can conform to.

In the one volume of the Mississippi Code of 1892 there are 1,244 total pages with a text field of approximately 380 square feet. In the Miss. Code Ann. of 1972 there are 21 volumes with a text field of approximately 8,788 square feet.

The immediately foregoing results in there being approximately 8,408 more square feet of text in the current Miss. Code Ann. of 1972 than there is in the Code of 1892. Obviously the majority of laws contained therein are unconstitutional as there could be nothing in the Constitution those laws could conform to. Among those laws are Title 15, Chapter 1, and Title 27, Chapter 109. There have been many amendments to the Constitution, most of which are amendments to existing provisions.

Other than the laws which will be requested to be declared unconstitutional in the Conclusion to this question, the majority of laws in those approximately 8,408 square feet of text are brought into question at this time to restrain defendants from invoking the principles of "res judicata" and/or "collateral estoppel" in planned future actions. The things a part of life today not existing in 1890 are too numerous to mention at this time. It is expected that a ruling on the laws in question needed for a determination of this case will also apply to other laws which do not conform to the Constitution.

As an example of how the Mississippi legislature operates, they convinced the people to repeal the prohibition against lotteries. When the people authorized the repeal, the legislature immediately passed laws authorizing riverboat gambling, which soon thereafter was expanded to include gambling on sunken barges in most every bayou which could be claimed to be connected to the Gulf of Mexico or the Mississippi River.

As to Title 15, Limitations of Actions, the only provision in the

Mississippi Constitution relative to a statute of limitations is in Article 4, Legislative Department Miscellaneous: "Section 104. Statutes of limitation in civil cases shall not run against the state or any subdivision or municipal corporation thereof." Article XII, General Provisions, of the Mississippi Constitution of 1869, had the following provision:

> "Section 24. The next legislature shall have the power to repeal statutes of limitation, pass relief, stay injunctions insolvent and homestead laws and to pass any and every act deemed necessary for the relief of debtors subject only to the restrictions imposed by the Constitution of the United States."

This section was not carried forward to the Constitution of 1890.

As to Title 27, Chapter 109, Gambling, the only provision in the Mississippi Constitution was in Article 4, Legislative Department:

> "Section 98. No lottery shall ever be allowed, or be advertised by Mississippi newspapers, or otherwise, or its tickets be sold in this state; and the legislature shall provide by law for the enforcement of this provision, nor shall any lottery heretofore authorized be permitted to be drawn or its tickets sold."

This provision was repealed by the electorate in 1992 and was not replaced by another provision permitting gambling.

Also, in the excerpts from the autobiography of Robert Harvey Thompson, Appendix I, it is stated: "The Committee (Revision) performed its duties to the entire satisfaction of the convention." This confirms the unique provisions of the Distribution of Powers article were ignored or forgotten about and the full impact of unique Section 278 was not realized. The work of the legislature, since November 1, 1890 has gone on as if these two unique provisions of the Constitution did not exist.

The Supreme Court of Mississippi did not rule on the constitutionality of laws in question in the Opinion. They were not an academic question. Such a ruling is necessary for determination of the issues in this case. *Hallum v Mobile & O.R.Co. 24 So.909, et al.:* "Unless it is necessary to a determination of the issues, the Supreme Court will not pass on the constitutionality of any statute." *Further Smith County v Eastman Gardner Co. 53 So. 7,* et al.: "Until the contrary is shown courts presume statutes to be constitutional."

CONCLUSION

WHEREFORE PREMISES CONSIDERED, The Supreme Court of the United States is hereby requested to rule on the Constitutionality of Mississippi laws needed for a determination of the issues in this Petition for a Writ of Certiorari, these being in full or in part:

Actions of attorney general and district attorney since November 1, 1890, p. 9

Actions of board of supervisors since November 1, 1890, p. 21
Miss. Code Ann. p. 25
§7-5-1, et seq., p. 14
§7-7-45, p. 30
Title 11, p. 20
§§11-39-1, 11-39-3, p. 21
Title 11, Chapter 46, p. 16
§§11-51-75, 11-51-77, p. 18, 21
Title 15, p. 25
Title 17, p. 21
Title 19, p. 21
except 4 statutes p. 21
§25-31-1 et seq., p. 14
§27-104-4(2), p. 31
Title 27, Chapter 109, p. 25
Mississippi Rules of Civil Procedure, p. 6

WHETHER THE PETITIONER SHOULD BE GRANTED THE PRECISE RELIEFS SOUGHT

In consideration of the foregoing, the Supreme Court of the United States is requested to make it possible to begin the process by which the precise reliefs sought as to State defendants, Appendix S, and as to Pontotoc County defendants, Appendix T, can be granted by granting this Petition for Writ of Certiorari. This in addition to that requested in the immediately preceding question.

The dollar amounts specified in Appendix F are within a three-year statute of limitations, however this limitation is a part of Title 15 and that Title is requested to be declared unconstitutional.

This, if done, will result in there being no statute of limitations in Mississippi. The dollar amounts shown are to be adjusted upward to reflect all taxes paid and costs incurred for the entire time petitioner was a taxpayer and/or a resident-taxpayer to the State of Mississippi and to Pontotoc County which goes back to May 31, 1975. Part of the dollar amounts specified in Appendix F are relative to other defendants in the Amended Complaint, which portion of the Amended Complaint is still on appeal in Mississippi.

Rule 43.3 of Rules of the Supreme Court of the United States, effective May 1, 1997, states, in part: "The expense of printing briefs, motions, and Petitions or Jurisdictional statements are not taxable." By the Mississippi Constitution, there appears to be no one but a petitioner who can initiate the constitutional questions in this petition as the attorney general and district attorney would not and if they would,

could not do so as they are precluded from exercising powers and duties of the executive magistracy as Constitutionally they are a part of the Judiciary. In doing so, they would be in violation of the Distribution of Powers Article of the Constitution, page 7; therefore the Supreme Court of the United States is respectfully requested to tax such costs to state and Pontotoc County defendants in connection with this petition.

Those citations referred to in the body of the petition which are obviously too voluminous to be quoted in the Appendix do not show a reference to the appendix, but are shown in Appendix V as stated on p. 2, however the critical part of such voluminous references is quoted or contained in the body of the petition or in the Appendices as noted to justify the Petitioner's arguments.

One of the precise reliefs sought, Appendix S, Item (9) and Appendix T, Item (10) is a call for a Constitutional Convention so the people will have an opportunity to correct the deficiencies in their Constitution. Petitioner realizes that in making the same request to the Supreme Court of the United States, on the surface, is contrary to the policies in place in the federal government to give states more self-determination of their affairs.

Petitioner presents the following chronological events which necessitate such a request as Mississippi's Constitutions do not have a provision by which a constitutional convention could be called after the 1817 Constitution. This would take a constitutional amendment authorized by the people. The Mississippi legislature continually rejects such a recommendation.

Actions towards a new Mississippi Constitution, other than the Amended Complaint include:

1. A Hoover Commission Report in 1931 recommending a new Mississippi Constitution went nowhere.

2. In 1984, Governor Allain's attempts to have the Legislature provide for a Constitutional Convention were rejected.

3. In 1985, Governor Allain enrolled publicly minded citizens and agreeable public officials to meet in Jackson, Mississippi, our Capitol, to frame a new Constitution. The Constitution they recommended to the Legislature was rejected.

4. In about 1988, the Constitutional Committees of both the Mississippi Senate and the House of Representatives held statewide hearings on the Constitution, but nothing resulted from those hearings.

5. In the gubernatorial campaign of 1991, Kirk Fordice endorsed a Constitutional Convention as a part of his platform for election. After taking office in 1992, Governor Fordice dropped the idea because it went nowhere with the Legislature.

6. In 1992, the Mississippi Economic Council supported another gathering of publicly minded citizens and agreeable public officials to frame a new Constitution. The Constitution they recommended was rejected by the Legislature.

7. On August 3, 1993, petitioner filed Initiative Measure No. 1, the same day implementing legislation was precleared by the Justice Department. The process put in place by the Legislature was unusable so a court action was initiated by petitioner to make it more acceptable. Both that and a subsequent action was denied by the circuit court in Jackson and rejected by the Supreme Court of Mississippi.

8. A Mr. Gil Carmichael from Meridian, Mississippi, a former candidate for Lieutenant-Governor in Mississippi, and a former federal government official, with statewide recognition and following made several attempts to have the legislature provide for the call of a Constitutional Convention, with no results. His latest attempt was made in the fall of 1998, but was rejected before the legislature went into its 1999 regular session.

The Mississippi Legislature has, by the foregoing, made absolutely clear they do not want a new Constitution for the State of Mississippi. An order, Appendix U, to call for a Constitutional Convention of the people, technically, would not be interfering with the government of Mississippi as the people are not considered a part of that government, see the Distribution of Powers Article p. 7. Considering the foregoing, this appears to be a legitimate and grantable precise relief to correct the deficiencies in the Mississippi Constitution.

It may be claimed in conforming all laws of Mississippi with Constitutional amendments would result in a voluminous Constitution; but that is what is required in the Mississippi Constitution by manifest implication in Section 278, p. 8. Refer to the *Chevron U.S.A. Inc. v State* declaration by the Supreme Court of Mississippi, p. 11.

If petitioner prevails in this case, such prevailing will undo many of the decisions handed down by the Supreme Court of Mississippi when the statutes requested to be declared unconstitutional were considered constitutional.

The petitioner believes he is entitled to a declaration by the Supreme Court of the United States that all Mississippi laws that do not conform to the Mississippi Constitution are unconstitutional. The petitioner also realizes that such a ruling would cause the immediate disestablishment of many of the governmental agencies that have been created and the elimination of sales, income and inheritance tax income to the state and property tax income to county government.

A way can be found to continue the process of government with a minimum of confusion in the delivery of services to the people until a

new Constitution is adopted, except that the offices of attorney general, district attorney and boards of supervisors should be ordered to act only as they are constitutionally authorized, that is to perform duties and functions of the judicial department only.

However, inasmuch as there is no such duties and functions authorized by the legislature, the legislature has in effect taken away all the duties of these offices, therefore the provisions of Constitutional Article 4, Legislative Department, Section 108, should apply: "Section 108. Whenever the legislature shall take away the duties pertaining to any office, the salary of the officer shall cease." This should apply to all assistant and deputy attorneys general and district attorneys.

A way can be found to do their jobs and enforce laws of the state minus these offices by delegating such authority to other law enforcement officials, one of whom is the Auditor of Public Accounts, a part of the executive department. County government can continue to operate without a board of supervisors; however, this will require the state legislature to perform all county legislative functions. A regular session of the legislature is 90 days this year. County executive functions can be taken care of by a Special Master temporarily until a new Constitution is ratified by the people. Another option is that existing municipal government may be expanded to oversee county operations and affairs.

The Auditor of Public Accounts is recommended to fill in for the attorney general as that office has been decimated by the legislature as follows:

The Auditor of Public Accounts, by the constitution, had three jobs. The first is contained in Constitutional Article 4, Legislative Department, Miscellaneous:

> "Section 113. The auditor, shall within sixty days after the adjournment of the legislature, prepare and publish a full statement of all money expended at such session, specifying the items and the amount of each item, and to whom, and for what paid; and he shall also publish the amounts of all appropriations."

This job was unconstitutionally taken away by Miss. Code Ann. §7-7-45, which states:

> "§7-7-45. Financial reports.
> The State fiscal officer shall, within sixty (60) days after the adjournment of the Legislature, prepare and furnish to the State Auditor, a full statement of all moneys expended at such session, specifying the items and the amount of each item, and to whom and for what paid, in order that the Auditor may publish the amounts of all appropriations, all as prescribed by Section 113 of the Constitution."

The enactment of this statute by the legislature is unconstitutional in that it changes who is supposed to prepare the report.

The Auditor's second job is contained in Constitutional Article 5, Executive:

"Section 115 (in part), and the Auditor of Public Accounts and the Treasurer of the State shall compile, and have published, a full and complete report, showing the transactions of their respective offices on or before the thirty-first day of December of each year for the preceding year."

Not only was who prepared the report changed, the content of the report was changed, an unconstitutional act of the legislature by enacting the provisions of Miss. Code Ann, §27-104-4(2) which states:

"The state fiscal officer shall combine the financial statements of the various state agencies into a comprehensive annual financial report for the State of Mississippi and shall provide it to the state auditor by September 30th of each year for post auditing. This report together with the State Auditor's opinion on the financial statements, shall be published as the official financial statement of the state in accordance with Section 115 of the Mississippi Constitution,"

The third job the Auditor of Public Accounts has is contained in Constitutional Article 5, Executive:

"Section 134. A State Treasurer and an Auditor of Public Accounts shall be elected as herein provided, who shall hold their office for the term of four (4) years, and shall possess the same qualifications as required for the Secretary of State. They shall receive such compensation as may be provided by law."

The following "Editor's Note" is contained in Miss. Code Ann, beginning with §7-7-1:

"Section 7-7-2, as added by Laws 1984, Chapter 488, §90, and amended by Laws, 1985, chapter 455, §14, Laws, 1986, Chapter 499, §1, provided at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of Auditors functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, §2, amended §7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of Mississippi in connection with the performance of the Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the

"State Fiscal Officer" whenever they appear. Subsequently, Laws, 1989, ch. 544, §17, effective July 1, 1989, and codified as §27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

"Section 27-104-6 provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

Either all or a part of the above quotation generally appears in the Annotated Code of Mississippi of 1972 whenever the terms or words "Auditor of Public Accounts", "State Auditor", "Auditor", or "State Fiscal Officer" is used therein.

The foregoing results in the Auditor of Public Accounts has little more to do than publish two reports and draw his paycheck. Mississippi therefore has a state auditor in name only. This all came about when Ray Mabus was elected Auditor of Public Accounts in the general election of 1983. Upon taking office in 1984, he began to comprehensively audit boards of supervisors. The audits hardly got started when they were taken over by the F.B.I., no new audits seem to have been undertaken. This appears to have been arranged by attorneys for boards of supervisors who were elected and serving in the legislature. As a part of the Judiciary, they were in violation of the Distribution of Powers Article, p. 7. These attorneys for boards of supervisors were serving as chairmen of the various house and senate standing committees and controlled legislation. With the above, they also made it possible to stop or make audits ineffective. As a result of F.B.I. investigations many members of boards of supervisors spent time in federal prisons, including all five of Pontotoc County's board of supervisors.

The problems created by ruling in favor of the petitioner are not insurmountable.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, the Supreme Court of the United States is respectfully requested to enable the beginning of the process to make it possible for the precise reliefs sought to be granted by the granting of this Petition for a Writ of Certiorari.

CONCLUSION TO PETITION FOR WRIT OF CERTIORARI

This Petition for a Writ of Certiorari should be granted for the reasons stated in the arguments and to the conclusions reached in each of the six questions presented for consideration by the Supreme Court of the United States and for the fact that it may be decades, nay perhaps another century or more before someone else attempts to take the re-

quired action in Mississippi.

When petitioner began the accumulation of data to support this action some fourteen years ago, it soon became evident that adjudication by a court outside the Mississippi Court system would be necessary to secure justice.

It also became apparent that no one in the legal profession in Mississippi would take on both the state and local government, even if the petitioner could afford it, for fear of retribution by the political power structure of Mississippi, which at one time was referred to as "The Octopus". The Petitioner undertook all the hours of study and research necessary to pursue this action "pro se". The one great concern was that the case would be dismissed for failure to properly follow the myriad of procedures. Petitioner believes the Supreme Court of Mississippi does not have an inkling this Petition would be made, or if it did, it would not be accepted by the Supreme Court of the United States. This is not a request for interpretation of the provisions of the Mississippi Constitution with the exception perhaps of a request to confirm the meaning assigned to Section 278 that by manifest implication all laws, past and present, have to conform to the Mississippi Constitution. It is an action to restore the preeminence of the Mississippi Constitution in its rightful place in the hierarchy of laws and to enforce its provisions.

The Opinion and Judgment, Appendixes A and C, are reflective of the kind of justice meted out by the courts in Mississippi.

The petitioner is acting only in his own behalf and the pleadings are so structured to show this. The precise reliefs requested cannot but help from affecting others, some positively, others negatively.

The basis for nonpublication is stated in M.R.A.P. 35-A, subsection (d), that being:

> "All Opinions that are found not to satisfy a standard for publication set out in Rule 35-A are marked "Not designated for Publication". Opinions marked "Not for Publication" shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court except in res judicata, collateral estoppel, or law of the case."

Standards of publication are set forth in subsection (b) of this rule:

> "(b) Standards for Publication, An Opinion of the Court shall be designated for publication where the Opinion:
>
> (1) establishes a new rule of law or alters or modifies an existing rule; or
>
> (2) involves a legal issue of continuing public interest; or
>
> (3) criticizes existing law; or
>
> (4) resolves an apparent conflict of authority; or

(5) will serve as a useful reference, such as one reviewing case law or legislative history."

The Opinion meets all the above five Standards for Publication. The petitioner believes the Opinion was marked "Not Designated for Publication" to cover up the retraction of the court's previous decisions, letting them all stand in the record as they are; and to also cover up the court's redefining actions against defendants to claim the Amended Complaint is something it is not so it can be ruled on in accordance with statutes to prevent petitioner from prosecuting public officials for improbities in office and to protect the "status quo" which has been established in Mississippi through similar actions by those in government, including the courts, to prevent use of Constitutional provisions.

Item (1) above appears to indicate the Supreme Court of Mississippi, in its decisions, is not adverse to making new law, which it cannot do, and when done is in violation of the mandated absolute separation of Powers, Article 1, of the Mississippi Constitution, p. 7.

Another example of the quality of justice handed down by Supreme Court of Mississippi is the declaration in *Moore v Molpus 578 So.2d 624 (Miss. 1991)*: "In most settings, the mere fact that a prior decision may have been wrong - even badly wrong - is not enough to move the judicial hand."

The Opinion of the Supreme Court of Mississippi appears to be more than "even badly wrong", it has all the earmarks of being intentionally wrong to protect the "status quo" they helped develop in Mississippi.

WHEREFORE PREMISES CONSIDERED, the Supreme Court of the United States is respectfully implored to grant this Petition for Writ of Certiorari to enable the beginning of the process by which the precise reliefs sought can be attained.

This the 12th day of February, 1999.

RESPECTFULLY SUBMITTED:

Carl Zimmerman

Carl Zimmerman, Petitioner Pro se
3433 Highway 341 South
Pontotoc, Mississippi, 38863-9338
Telephone: 601-489-1392

Proof of Service in accordance with Rule 29.2 and 28 U.S.C.A. § 1746, is enclosed separate from the Petition for Writ of Certiorari booklet.

SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI
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Chief Deputy

Bettye Malanchak
Deputy Clerk

September 17, 1998

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 17th day of September, 1998.

Supreme Court Case # 97-CP-00694-SCT
Trial Court Case # 95160

Carl Zimmerman v. Pontotoc County, Mississippi, Board of Supervisors; their Attorney and Clerk Collectively and/or Individually; United States Fidelity and Guaranty Company; State of Mississippi, Attorney General; and District Attorney, Circuit Court District One

Judgment affirmed. Appellant taxed with costs of appeal.

NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 97-CP-00694-SCT

CARL ZIMMERMAN

v.

PONTOTOC COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS; THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY; UNITED

STATES FIDELITY AND GUARANTY COMPANY;
STATE OF MISSISSIPPI; ATTORNEY GENERAL;
AND DISTRICT ATTORNEY, CIRCUIT COURT
DISTRICT ONE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION
AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-A

DATE OF JUDGMENT:	04/07/97
TRIAL JUDGE:	HON. FRANK ALLISON RUSSELL
COURT FROM WHICH APPEALED:	PONTOTOC COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEYS FOR APPELLEES:	MICHAEL N. WATTS DAN W. WEBB DAVE SCOTT
NATURE OF THE CASE:	CIVIL - STATE BOARDS AND AGENCIES
DISPOSITION:	AFFIRMED- 9/17/98
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE SULLIVAN, P.J., McRAE AND SMITH, JJ.
SMITH, JUSTICE, FOR THE COURT:

On June 13, 1995, Carl Zimmerman: pro se, filed a Complaint in the Circuit Court of Pontotoc County alleging various claims against the Pontotoc County Board of Supervisors, its attorney and its clerk (hereinafter "Pontotoc County Defendants") both related and unrelated to the dispute over fees for garbage collection at his residence. On October 30, 1995, the circuit court quashed process as to Zimmerman's complaint for his failure to properly serve process on some of the defendants.

On January 26, 1996, Zimmerman filed the Amended Complaint currently at issue asserting numerous claims against the defendants alleging that Pontotoc County had violated various policies in its decision to collect garbage from rural residents and to charge a fee for the collection service. The State of Mississippi, the Attorney General, and the district attorney for Pontotoc County (hereinafter "State Defendants) were also named to the lawsuit as a result of an advisory opinion issued by the Attorney General, and United States Fidelity and Guaranty Company (hereinafter "USF&G") was joined to the lawsuit

as surety for the Pontotoc County Board of Supervisors. On January 7, 1997, the Pontotoc County Defendants filed a Motion for Summary Judgment which was later joined by USF&G, and on May 1. 1997, the circuit court granted summary judgment to both the Pontotoc County Defendants and USF&G. On February 7, 1997, the State Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted, and on April 7, 1997, the circuit court granted the motion dismissing the State Defendants. Aggrieved by the circuit court's decisions, Zimmerman appeals to this Court and raises the following issues:

I. WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE STATE DEFENDANTS' MOTION TO DISMISS.

II. WHETHER THE STATE DEFENDANT'S ARE IMMUNE FROM SUIT PURSUANT TO THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

III. WHETHER THE STATE DEFENDANTS ARE IMMUNE FROM SUIT PURSUANT TO MISS. CODE ANN. §11-46-9.

IV. WHETHER THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE AMENDED COMPLAINT PURSUANT TO MISS, CODE ANN. §11-51-75.

V. WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE COUNTY DEFENDANTS AND USF&G SUMMARY

FACTS

The underlying facts from which this case arises stem from the Pontotoc County Board of Supervisors' (hereinafter "Board") decision to collect garbage from rural residents and to charge a fee for this collection service. Zimmerman delivered a letter to the Board, dated May 21, 1993, in which he stated that there would be no garbage or rubbish generated at his property for removal and disposal by the County and requested that he not be billed accordingly for not receiving this service. However, Zimmerman was billed, but did not pay, for residential garbage pickup beginning the month of May 1993 through October 1993 a total amount of $49.20. Then by letter dated November 1, 1993, Zimmerman stated that garbage or rubbish would be properly placed for collection and disposal at his residence, and he began paying the monthly fee for residential garbage disposal.

On December 31. 1994, Zimmerman requested a hearing to contest the past due amount on his account for garbage for collection which he contended he did not owe the fee because he did not place any garbage out for collection by the County. On February 28, 1995, a hearing was conducted before a hearing officer, B.N. Simmons, who, relying on Attorney General's Opinion No. 266-D, concluded that Zimmerman owed the $49.20 since he was a residential generator of solid

waste. In addition, on February 28, 1995, the Board entered an order confirming the hearing officer's decision. Zimmerman did not take any appeal of the Board's decision pursuant to a bill of exceptions within ten days of the decision as provided by Miss. Code Ann. §11-51-75. However, on June 13, 1 995. Zimmerman, pro se, filed a complaint in the Circuit Court of Pontotoc County alleging various claims against the Pontotoc County Defendants with the claims being both related and unrelated to the dispute over fees for garbage collection at his residence. On October 30, the circuit court quashed process as to Zimmerman's complaint for his failure to properly serve process on some of the defendants.

Then, on January 26, 1996, Zimmerman filed the Amended Complaint currently at issue before this Court asserting numerous claims against the defendants alleging that Pontotoc County had violated various policies in its decision to collect garbage from rural residents and to charge a fee for the collection service. Zimmerman also joined numerous other defendants in the Amended Complaint including the State Defendants as a result of advisory opinion No. 266-D and USF&G as surety for the Board.

On January 7, 1997, the Pontotoc County Defendants filed a Motion for Summary Judgment which was later joined by USF&G, and on May 1, 1997, the circuit court granted summary judgment to both the Pontotoc County Defendants and USF&G. The circuit court held that it lacked subject matter jurisdiction over the Amended Complaint because Zimmerman failed to appeal the February 28, 1995 decision of the Board within ten days pursuant to Miss. Code Ann. §11-51-75 and, further, that the Pontotoc County Defendants and USF&G were entitled to judgment as a matter of law under Rule 56 of the Mississippi Rules of Civil Procedure for Zimmerman's failure to present any genuine issues of material fact.

On February 7, 1997, the State Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure for failure to state a claim upon which relief could be granted. On April 7, 1997, the circuit court granted the State Defendants motion and held that Zimmerman had failed to state a claim upon which relief could be granted and that the State Defendants were immune from suit pursuant to both the Eleventh Amendment of the United States Constitution and Miss. Code Ann. §11-46-9.

Aggrieved by the circuit court's decisions, Zimmerman, pro se, appeals to this Court seeking relief.

DISCUSSION OF LAW

I. WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE STATE DEFENDANTS' MOTION TO DISMISS.

Zimmerman contends that the circuit court erred by granting the State Defendants' Motion to Dismiss because he did state a claim upon which relief could be granted pursuant to Article III, Sections 24 and 25 of the Mississippi Constitution of 1890. Zimmerman asserts that this action was initiated under Article III, Section 24 which provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay" and contends that he was injured as a result of an advisory opinion issued by the Attorney General that was manifestly wrong and without substantial support. Miss. Const. art. 3, § 24. The State Defendants, however, assert that "a citizen's dissatisfaction or disagreement with an advisory opinion issued by the Office of the Attorney General gives no rise to a cause of action against the Attorney General." When reviewing a circuit court's sustaining of a Rule 12(b)(6) Motion to Dismiss, this Court has held that "upon a motion for dismissal pursuant to Rule 12(b)(6) M.R.C.P., for failure to state a claim upon which relief can be granted, the pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." Weeks v. Thomas, 662 So. 2d 581, 585 (Miss. 1995) (citing Overstreet v. Merlas, 570 So. 2d 1196, 1197 (Miss. 1990)). This Court has stated that "[a] motion to dismiss under M.R.C.P. 12(b)(6) tests the legal sufficiency of the complaint... [T]o grant this motion there must appear certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." Weeks. 662 So. 2d at 585 (quoting Busching v. Griffin, 465 So. 2d 1037, 1039 (Miss. 1985)).

Miss. Code Ann. § 7-5-25 requires the Attorney General as one of his official duties to give his opinion in writing to various state governmental officers, including boards of supervisors, upon any question of law relating to their respective offices. Miss. Code Ann.
§ 7-5-25 (Supp. 1997). Miss. Code Ann. § 7-5-25 additionally provides in part:

> When any officer, board, commission, department or person authorized by this section to require such written opinion of the Attorney General shall have done so and shall have stated all the facts to govern such opinion, and the Attorney General has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith unless a court of competent jurisdiction, af-

ter a full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support.

Miss. Code Ann. § 7-5-25 (Supp. 1997). Thus, Miss. Code Ann. § 7-5-25 provides that any officer, board, commission, department or person authorized to require a written opinion of the Attorney General may be held liable for their actions if they do not rely on the opinion in good faith and the opinion is later found by a court of competent jurisdiction to be manifestly wrong and without any substantial support. We find that section 7-5-25 provides that an aggrieved party may have a cause of action against the officer, board, commission, department or individual who relies on the opinion of the Attorney General and makes a final decision from which they are injured, but further, since section 7-5-25 does not address the liability of the Attorney General for an opinion that is manifestly wrong and without any substantial support, the exclusive remedy for an aggrieved party is against the officer, board, commission, department or individual relying on the opinion in making its decision. As a result, we find that the State Defendants' assertion that no cause of action exists against the Attorney General for a citizen who is dissatisfied or disagrees with an advisory opinion of the Office of the Attorney General is well taken, and the circuit court correctly held that no cause of action existed.

Zimmerman also contends that the Amended Complaint asserted a claim of a violation of the doctrine of separation of powers as set forth in Article I, Sections 1 and 2 of the Mississippi Constitution of 1890 on which relief could be granted. Zimmerman asserts that since the creation of the Office of Attorney General appears under Article VI of the Mississippi Constitution of 1890 which is entitled "Judiciary," the Office of the Attorney General is a member of the judiciary, and therefore, the Attorney General's issuance of advisory opinions, an executive function, is a violation of the doctrine of separation of powers pursuant to Article I, Section 2 of the Mississippi Constitution of 1890.

However, we hold that this claim is without merit. The Office of the Attorney General is clearly a part of the Executive Department of Government. See Miss. Code Ann. § 7-5-1 et seq. (1991). This Court in *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987), stated in a footnote the import of the Article labels found in the Constitution as follows:

> We think the import of the constitution's article labels more modest. They are a mere facility of convenience, adding or detracting nothing from the content of the substantive language of the various sections of the constitution. Indeed, the article labels carry no more significance than do the section numbers.

> For example, the offices of Attorney General (Art. 6, § 173) and District Attorney (Art. 6, § 174) are found in the article labeled "Judiciary," yet these offices are commonly thought of as belonging to the Executive Department of government.

Dye v. State ex rel. Hale, 507 So. 2d 332, 346 n.20 (Miss. 1987). Thus, since the Article headings are not determinative of which governmental department a state governmental office belongs to, and the Office of Attorney General is included in the Executive Department under the Mississippi Code of 1972, the Office of the Attorney General's, as an office of the Executive Department, issuance of an advisory opinion per statutory authority does not violate the doctrine of separation of powers contained in Article I. Section 2.

Furthermore, the Attorney General does not encroach upon a function of the legislature or the judiciary by issuing advisory opinions. The Attorney General performs a constitutional duty of his office when he issues advisory opinions in the exercise of a State executive function in furtherance of the public interest. See *State v. Southern Pine Co.*, 205 Miss. 80, 94, 38 So. 2d 442, 447 (1949). When the Attorney General issues an advisory opinion, he is not exercising a judicial function, but instead, he is exercising judicious discretion under a legislatively mandated duty. See *Secretary of State v. Wiesenberg*, 633 So. 2d 983, 998 (Miss. 1994); *Southern Pine Co.*, 205 Miss. at 94, 38 So. 2d at 447. Thus, we hold that there is no merit to Zimmerman's allegation of a violation of the separation of powers doctrine.

As a result, we hold that the circuit court did not err in sustaining the State Defendants' Motion to Dismiss because Zimmerman's complaint failed to state a claim upon which relief could be granted.

II. WHETHER THE STATE DEFENDANTS' ARE IMMUNE FROM SUIT PURSUANT TO THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Zimmerman contends that the circuit court erred in concluding that the State Defendants were immune from suit pursuant to the Eleventh Amendment of the United States Constitution. Zimmerman asserts that Eleventh Amendment immunity does not apply in state courts. Regardless, though, this issue is moot for Zimmerman failed to state a claim in his Amended Complaint upon which relief could be granted, and thus, whether the State Defendants are immune from suit under the Eleventh Amendment in an action filed in state court is moot under the circumstances of this case. Alternatively, we find that if this issue was not moot and a claim had been stated upon which relief could be granted, the State Defendants would not be immune from suit under the Eleventh Amendment in state courts.

The Eleventh Amendment of the United States Constitution pro-

vides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced and prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend XI. The United States Supreme Court has held on several occasions that "the Eleventh Amendment does not apply in state courts." See *Hess v. Porf Auth. Trans-Hudson Corp.*, 513 U.S. 30, 34 (1994); *Hilton v. South Carolina Pub. Rys, Comm'n*, 502 U.S. 197, 205 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64 (1989). The Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), stated, "No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). As a result, we hold that the circuit court erred in holding that the State Defendants were immune from suit under the Eleventh Amendment, but this error is harmless where the State Defendants were dismissed from suit because of Zimmerman's failure to state a claim upon which relief could be granted.

III. WHETHER THE: STATE DEFENDANTS ARE IMMUNE FROM SUIT PURSUANT TO MISS, CODE ANN. § 11-46-9.

Zimmerman contends that the circuit court erred by holding that the State Defendants are immune from suit under Miss. Code Ann. § 11-46-9. Zimmerman asserts that Miss. Code Ann. § 11-46-9 is not applicable because this suit was brought under Article III, Section 25 of the Mississippi Constitution of 1890. The State Defendants, however, assert that Miss. Code Ann. § 11- 46-9(1)(a) provides immunity from suit for the issuance of an advisory opinion by the Office of Attorney General pursuant to Miss. Code Ann. § 7-5-25. Regardless, though, we find that this issue is moot since Zimmerman failed to state a claim in his Amended Complaint upon which relief could be granted, and thus, whether the State Defendants are immune from suit under Miss. Code Ann. § 11-46-9 is moot under the circumstances of this case. Alternatively, if this issue was not moot and a claim had been stated upon which relief could be granted, we hold that the State Defendants would be immune from suit pursuant to Miss. Code Ann. § 11-46-9(l)(a).

First, Miss. Code Ann. § 11-46-7(1) provides:

> The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and

> any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

Miss. Code Ann. § 11-46-7(1) (Supp. 1997). Thus, Miss. Code Ann. § 11-46-7(1) provides the exclusive remedy for any demand by an individual to recover damages from a government entity as compensation for injuries.

Miss. Code Ann. § 11-46-9(1)(a) provides as follows: "A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." Miss. Code Ann. § 11-46-9(1)(a) (Supp. 1997). Miss. Code Ann. § 7-5-25 requires the Attorney General to give advisory opinions when requested by certain governmental officials. *See* Miss. Code Ann. § 7-5-25 (Supp. 1997). Thus, the Attorney General's issuance of advisory opinions pursuant to Miss. Code Ann. § 7-5-25 is an administrative action of a judicial nature to which Miss. Code Ann. § 11-46-9(1)(a) grants immunity from suit, for the Attorney General is acting within the scope of his duties. Further, this Court has held that sovereign immunity cloaks all governmental functions which a governmental entity is required to undertake. *See Westbrook v. City of Jackson*, 665 So. 2d 833, 836 (Miss. 1995). Thus, where the Attorney General is required to issue advisory opinions, such action is a governmental function cloaked by sovereign immunity. As a result, we hold that if Zimmerman did have a claim against the State Defendants for the Attorney General's issuance of an advisory opinion, the State Defendants would be immune from suit on such claim because the issuance of an advisory opinion is a governmental function of the Office of the Attorney General that is exempt from liability pursuant to Miss. Code Ann. § 11-46-9(l)(a).

IV. WHETHER THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE AMENDED COMPLAINT PURSUANT TO MISS. CODE ANN. § 11-51-75.

Zimmerman asserts that the circuit court erred by holding that it lacked jurisdiction over any claims arising out of the Board's February 28, 1995 decision for failure to file a bill of exceptions within ten days of the decision pursuant to Miss. Code Ann. § 11-51-75. Zimmerman contends that his Amended Complaint is not an appeal from a decision of the Board and, thus, that a bill of exceptions is not required. The Pontotoc County Defendants assert that Miss. Code Ann. § 11-51-75 provided Zimmerman the exclusive remedy for challenging the Board's

February 28, 1995 decision that Zimmerman owed the past due garbage collection fees from May 1993 through October 1993.

Miss. Code Ann. § 11-51-75 provides in pertinent part:

> Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities.

Miss. Code Ann. § 11-51-75 (1972). This Court has consistently held that § 11-51-75 provides a "plain, adequate, speedy, and complete remedy" for an aggrieved person to challenge a judgment, order, decision or other action of a board of supervisors or municipal authority. *Moore v. Sanders.* 558 So. 2d 1383, 1385 (Miss. 1990); *see also Benedict v. City of Hattiesburg,* 693 So. 2d 377, 381 (Miss. 1997) (holding § 11-51-75 provided an exclusive remedy to party seeking declaratory and injunctive relief from action of municipality); *South Cent, Turf, Inc, v. City of Jackson,* 526 So. 2d 558, 561 (Miss. 1988) (holding that circuit court had exclusive jurisdiction of appeal from decision of the City of Jackson pursuant to § 11 -5 1-75). This Court has additionally held that where an aggrieved person fails to appeal the judgment, order, or decision of a board of supervisors or municipal authority pursuant to § 11-51-75 that such person is prohibited from collaterally attacking the judgment, order, or decision. *See, e.g., Moore,* 558 So. 2d at 1385; *Biloxi-Pascagoula Real Estate Bd., Inc. v. Mississippi Reg'l Hous. Auth. No, VIII,* 231 Miss. 89, 98, 94 So. 2d 793, 796 (1957). In upholding the ten-day period to appeal provided in § 11-51-75, this Court stated "it has long been the law of this state that statutes limiting the time within which appeals may be taken are both mandatory and jurisdictional." *Shannon Chair Co. v. City of Houston,* 295 So. 2d 753, 754-55 (Miss. 1974).

In the case sub judice, the Pontotoc County Board of Supervisors entered a final order on February 28, 1995 holding, pursuant to the hearing officer)s decision, that Zimmerman owed the garbage collection fees in question. Zimmerman did not file his initial Complaint until June 13, 1995 which was well past the ten-day period of appeal provided in § 11-51-75. Service of process on this initial Complaint was quashed by the circuit court on October 31, 1995, and Zimmerman filed his Amended Complaint on January 25, 1996, some eleven months after the Board's decision that Zimmerman owed the garbage collection fees in dispute. Counts 1 and 6 of the Amended Complaint amount

to an appeal of the February 28, 1995 decision. Thus, pursuant to § 11-51-75, where Zimmerman failed to file his appeal within the ten-day period provided, the circuit court correctly held that it lacked jurisdiction over these claims. *See Moore*, 558 So. 2d at 1385; *South Cent. Turf, Inc.*, 526 So. 2d at 562-63 *Shannon Chair Co. v. City of Houston*, 295 So. 2d 753, 754-55 (Miss. 1974). Furthermore, where Zimmerman failed to properly file a bill of exceptions with the circuit court, the circuit court correctly held that it lacked jurisdiction over these claims. See *McIntosh v. Amacker,* 592 So. 2d 525, 527-28 (Miss. 1991) (holding that failure to file bill of exceptions pursuant to § 11-51-75 fatal to appeal to circuit court from decision of board of supervisors); Cox v. Board of Supervisors of Madison County, 290 So. 2d 629. 630 (Miss. 1974) (same).

Zimmerman, however, contends that his Amended Complaint is not an appeal of the February 28, 1995 decision of the Board but relies on Article III, Section 25 of the Mississippi Constitution of 1890 to assert that it is a civil action guaranteed by the Mississippi Constitution. The Pontotoc County Defendants assert that Article III, Section 25 does not create a civil action in Appellant but, rather, that it provides him with the right to proceed pro se in otherwise proper civil claims which he has standing to pursue.

Article III, Section 25 of the Mississippi Constitution of 1890 provides as follows: "No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. art. 3. § 25. This Court has addressed the effect of Article III. Section 25 in a manner similar to the assertion by the Pontotoc County Defendants. In *Bullard v. Morris,* this Court held that "it is without question that the Mississippi Constitution permits a person to represent himself, pro se. in a civil proceeding... However, having elected to proceed without an attorney, a person is bound by the same rules of practice and procedure as an attorney." *Bullard v. Morris*, 547 So. 2d 789, 790 (Miss. 1989). Article III, Section 25 has never been held by this Court to create the right to bring a civil action. Therefore, Article III, Section 25 does not create a separate action to challenge a decision of a board of supervisors but only gives Zimmerman the right to proceed pro se under an otherwise properly filed civil action. Furthermore, since Zimmerman, being bound by the same rules of practice and procedure as an attorney, did not appeal the Board's decision within ten days of the decision and did not file a separate bill of exceptions, we hold that the circuit court correctly held that it lacked subject matter jurisdiction over the claims related to the February 28, 1995 decision and final order of the Board. Accordingly, this issue is without merit.

V. WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE PONTOTOC COUNTY DEFENDANTS AND USF&G SUMMARY JUDGMENT.

Zimmerman asserts that the circuit court erred in granting summary judgment to the Pontotoc County Defendants and USF&G because genuine issues of material fact exist. The Pontotoc County Defendants and USF&G contend that the circuit court did not err by granting summary judgment because no genuine issue of material fact was raised by Zimmerman in the circuit court to sustain any of his claims.

Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). "To prevent summary judgment, the nonmoving party must establish a genuine issue of material fact by means allowable under the Rule." *Travis v. Stewart,* 680 So. 2d 214, 216 (Miss. 1996) (citing *Lyle v. Mladinich*, 584 So. 2d 397, 398 (Miss. 1991)). The Court in *Travis v. Stewart* further stated this Court's scope of review as follows:

> This Court employs a de novo standard of review in reviewing a lower court's grant of summary judgment motion. *Short v. Columbus Rubber & Gasket Co., Inc.*, 535 So. 2d 61, 63 (Miss. 1988). Evidentiary matters are viewed in the light most favorable to the nonmoving party. *Palmer v. Biloxi Regional Medical Center, Inc.*. 564 So. 2d 1346, 1354 (Miss. 1990). If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed. *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983).

Travis, 680 So. 2d at 216.

In conducting a de novo review of the circuit court's grant of summary judgment to the Pontotoc County Defendants and USF&G. we will address each claim stated by Zimmerman in his Amended Complaint. First, as discussed above, the circuit court lacked subject matter jurisdiction over Counts 1 and 6 of Zimmerman's Amended Complaint as a result of Zimmerman's failure to appeal the Board's February 28, 1995 decision within the ten day period provided in Miss. Code Ann. § 11-51-75 and failure to file a separate bill of exceptions per § 11-51-75. Thus, we hold that summary judgment was appropriate on these claims.

Counts 3 and 4 of Zimmerman's Amended Complaint allege that the Pontotoc County Defendants participated in levying real and personal property taxes in excess of the amount allowed by law and also challenge the procedures used in levying the taxes. Miss. Code Ann. § 11-51-77 provides in pertinent part:

> Any person aggrieved by a decision of the board of supervisors . . . as to the assessment of taxes, may, within ten days after the adjournment of the meeting at which such decision is made, appeal to the circuit court of the county, upon giving bond, with sufficient sureties, in double the amount of the matter in dispute, but never less than one hundred dollars...

Miss. Code Ann. § 11-51-77 (1972). This statute provides the exclusive remedy for a taxpayer to challenge tax assessments. See *Thompson v. Anding*, 370 So. 2d 1335, 1338 (Miss. 1979). Thus, we find that where Zimmerman did not challenge these tax assessments within the ten-day period provided for doing so by § 11-51-77, the circuit court lacked jurisdiction over these claims. As a result, we hold that the circuit court did not err by granting summary judgment because the Pontotoc County Defendants were entitled to judgment as a matter of law on these issues. In Counts 10 and 11 of his Amended Complaint, Zimmerman complains that K. Herring, the President of the Board, violated his oath of office through a conflict of interest by also serving as a member of the board of directors of Three Rivers Solid Waste Management Authority (hereinafter "Three Rivers"). Zimmerman also complains that Phil Tutor, attorney for the Board, is engaged in a conflict of interest by also acting as attorney for several other public entities including Three Rivers. The Pontotoc County Defendants assert that Zimmerman lacks standing to assert these claims requesting removal of these officials.

Miss. Code Ann. §§ 11-39-1 and 11-39-3 provide that the exclusive remedy for removal of an official from public office is a quo warranto action. Miss. Code Ann. § 11-39-1 provides in pertinent part:

> The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz.:
>
> First.-Whenever any person unlawfully holds or exercises the functions of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office.

Miss. Code Ann. § 11-39-1 (1972). Miss. Code Ann. § 11-9-3 provides for a quo warranto action to be brought as follows:

> The proceedings in the cases set forth in Section 11-39-1 shall be by complaint, in the name of the state, by the Attorney General or a district attorney, on his own motion or on relation of another, and in a case to try the right to an office, on the relation of the claimant thereof.

Miss. Code Ann. § 11-39-3 (Supp. 1997). Thus, Miss. Code Ann. § 11-39-3 allows for such an action to be either a public action, i.e., one

brought by the Attorney General or a district attorney, or a private action, i.e., one brought by an individual who claims a right to the office. In the case sub judice, Zimmerman does not have standing to bring a public action, for he is not the Attorney General or a district attorney. Likewise, Zimmerman does not have a right to bring a private action for quo warranto because he has no right to the office from which he seeks to have the defendants removed. See *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1324-25 (Miss. 1995) (holding that private action for writ of quo warranto can only be maintained by person claiming right to the office). As a result, Zimmerman lacks standing to challenge the removal of these officers, and thus, the circuit court was correct in granting judgment as a matter of law to the Pontotoc County Defendants on these claims.

In Count 12 of his Amended Complaint, Zimmerman claims that the Pontotoc County Defendants are violating the separation of powers provisions contained in Article I, Sections 1 and 2 of the Mississippi Constitution by making local laws, including budget preparation and submission for operation of the county, and by levying taxes. Zimmerman complained that these functions violated the separation of powers doctrine because boards of supervisors were created as a part of the Judiciary by Article VI: Section 170 of the Mississippi Constitution of 1890. We find that there has been no violation of the separation of powers doctrine by the Pontotoc County Defendants. Once again, this Court's opinion in *Dye v. State ex rel. Hale* is persuasive in this respect. The *Dye* Court's footnote leads us to conclude that boards of supervisors are not to be precluded from performing legislative or executive functions simply because the Constitutional section stating the qualifications for membership on the boards of supervisors appears under the heading "Judiciary" in the Constitution. See *Dye*, 507 So. 2d at 346 n.20. The *Dye* Court stated, "Moreover, qualifications for membership on a county board of supervisors are provided in the "Judiciary" article (Art. 6. § 176), but this does not exclude supervisors from the exercise of legislative, executive or administrative functions." *Id*. The duties carried out by the Pontotoc County Defendants and complained of in this case are powers and duties granted to the boards of supervisors by statute, and thus, we find no violation of the separation of powers doctrine by the Pontotoc County Defendants by making local laws and levying taxes. As a result, we hold that the circuit court correctly granted summary judgment on this issue because the Pontotoc County Defendants were entitled to judgment as a matter of law.

The Pontotoc County Defendants assert that they are immune from suit, both in their official and individual capacities, pursuant to Miss. Code Ann. § 11-46-9, for the remaining claims in Zimmerman's

Amended Complaint which includes the following claims: Counts 2(A)-(G); 5; 7(A), (G), and (H); 8; 9. Miss. Code Ann. §§ 11-46-1 *et seq.* addresses the issue of sovereign immunity of governmental entities and their employees from suits on various types of claims. Under Miss. Code Ann. § 11-46-l(a)(Supp. 1997), a "claim" is defined as "any demand to recover damages from a governmental entity as compensation for injuries." The term "governmental entity" includes political subdivisions of the state such as counties. Miss. Code Ann. § 11-46-1(g), (i) (Supp. 1997). "Employees" granted immunity under Miss. Code Ann. §§ 11-46-1 *et seq.* include "any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity." Miss. Code Ann. § 11-46-1(f) (Supp. 1997).

This Court has addressed the constitutionality of immunity granted by the legislature pursuant to Miss. Code Ann. § 11-46-3 and has held that the immunity extended to governmental entities and their employees does not offend the remedy clause (Article III, Section 24) of the Mississippi Constitution. *Robinson v. Stewart,* 655 So. 2d 866, 870 (Miss. 1995). This Court has also held that sovereign immunity cloaks all "governmental functions" a municipality performs. *Westbrook*, 665 So. 2d at 836.

In Count 2A-G of his Amended Complaint, Zimmerman alleges that the Pontotoc County Defendants violated their oaths of office by: (A) failing to enact regulations for collection of garbage and rubbish disposal; (B) failing to timely establish and publish rates; (C) failing to make rules and regulations before advertising for household garbage (D) failing to follow proper procedures for advertising for garbage trucks and beds; (E) purchasing 5 trucks and beds based on authorization to purchase only four trucks and beds; (F) executing contracts to purchase trucks and beds without a required acknowledgment of receipt of equipment; and (G) failing to act properly in hiring sanitation personnel, buying truck tags, imposing fees, and exempting households with approved contract haulers. Zimmerman alleges mental anguish and requests reimbursement of $227.20 plus interest and costs of the action.

Pursuant to Miss. Code Ann. § 11-46-9, a governmental entity and its employees cannot be held liable for any claim:

> (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
>
> (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or

in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

. . . .

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services...

Miss. Code Ann. § 11-46-9(1)(a), (b), (g) (Supp. 1997). Thus, we find that Zimmerman's claims in Count 2 fall under one or more of the categories of claims listed above for which the Pontotoc County Defendants can not be held liable either in their official or individual capacities. As a result, we hold that the circuit court correctly granted judgment as a matter of law to the Pontotoc County Defendants on these claims.

In Count 5 of his Amended Complaint. Zimmerman alleges that the Pontotoc County Defendants did not comply with the terms of their tax levy resolution on unspecified services for fiscal year 1992-1993. Zimmerman alleges mental anguish and seeks the reimbursement of taxes for which services were allegedly not rendered. Miss. Code Ann. § 11-46-9(1)(i)(Supp. 1997) provides that a governmental entity and its employees can not be held liable for any claim "[a]rising out of the assessment or collection of any tax or fee." Furthermore, Miss. Code Ann. § 11-46-9(1)(g)(Supp. 1997) provides immunity from any claim " [a]rising out of the exercise of discretion in... the provision of adequate governmental services." Thus, we find that the claims in Count 5 are barred and that the circuit court correctly dismissed the claims with prejudice.

In Counts 7(A), (G), and (H) of his Amended Complaint, Zimmerman alleges that the Pontotoc County Defendants did not keep records in their minutes of individual votes on particular issues, did not post required notices of recessed meetings, and did not submit to the Department of Environmental Quality the Board's resolution specifying the geographic area of the proposed site for the Three Rivers landfill. In Count 8 of his Amended Complaint, Zimmerman alleges claims against the Pontotoc County Defendants for failing to attach copies of their resolution to the various copies of Host County Agreements contained in their minutes, and Zimmerman also alleges that a copy of the Host County Agreement was improperly placed in the Board's records without a motion or votes being taken. Zimmerman alleges that he has suffered mental anguish from the Board's actions or inactions in Counts 7 and 8.

We, however, find that these claims are barred by Miss. Code Ann. § 11-46-9(1)(a) in that it prohibits liability as to the Pontotoc County Defendants for claims arising out of legislative or administrative action or inaction. Furthermore, these claims are barred pursuant to Miss. Code Ann. § 11-46-9(1)(b)(Supp. 1997) as it prohibits liability as to the Pontotoc County Defendants for claims "[a]rising out of any act or omission of an employee of a governmental entity... in the failure to execute or perform, a statute, ordinance, or regulation." As a result, we hold that the circuit court properly dismissed these claims with prejudice.

In Count 9(C) and (E) of his Amended Complaint, Zimmerman alleges that the Pontotoc County Defendants approved payment of a bill to Three Rivers in excess of the amount that should have been billed which resulted in Zimmerman incurring excess taxes and fees and suffering mental anguish. We hold that the circuit court properly dismissed these claims with prejudice as being barred pursuant to Miss. Code Ann. § 11-46-9(1)(a)(Supp, 1997) as claims arising out of legislative action in approving the referenced billing statements.

As a result, we hold that Zimmerman did not present a genuine issue of material fact that would preclude the Pontotoc County Defendants' Motion for Summary Judgment, and as a result, the circuit court properly granted the Pontotoc County Defendants summary judgment. In addition, since a bonding company may only be held liable to the extent of its principal, the circuit court properly granted summary judgment to USF&G since it was at all times surety for the Pontotoc County Defendants which were properly granted summary judgment. See *Mohundro v. Alcorn County*, 675 So. 2d 848, 854 (Miss. 1996) (citing *State ex rel. Brazeale v. Lewis*, 498 So. 2d 321, 324 (Miss. 1986)).

CONCLUSION

We affirm the circuit court's dismissal of the State Defendants for the following reasons: (1) Zimmerman failed to state a claim upon which relief could be granted under any set of proven facts; (2) although the circuit court erred in holding that the State Defendants were immune from suit under the Eleventh Amendment in a state court, such error was harmless where no claim upon which relief could be granted was stated by Zimmerman; and (3) even if a cause of action existed for Zimmerman, the State Defendants would have been immune from suit pursuant to Miss. Code Ann. § 11-46-9(1)(a). Likewise, we affirm the circuit court's grant of summary judgment to the Pontotoc County Defendants and USF&G because Zimmerman failed to raise genuine issues of material facts, and the Pontotoc County Defendants and USF&G were both entitled to judgment as a matter of law on all claims raised by Zimmerman.

JUDGMENT AFFIRMED.

PRATHER, C.J., SULLIVAN AND PITTMAN, P.JJ., BANKS, McRAE, MILLS AND WALLER, JJ., CONCUR. ROBERTS, J., NOT PARTICIPATING.

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December 3, 1998

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 3rd day of December, 1998.

Supreme Court Case # 97-CP-00694-SCT
Trial Court Case # 95160

Carl Zimmerman v. Pontotoc County, Mississippi, Board of Supervisors; their Attorney and Clerk Collectively and/or Individually; United States Fidelity and Guaranty Company; State of Mississippi, Attorney General; and District Attorney, Circuit Court District One

Motion for rehearing, denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To the Pontotoc County Circuit Court - GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 97-CP-00694-SCT
Trial Court Case #95160

Carl Zimmerman v. Pontotoc County, Mississippi, Board of Supervisors; their Attorney and Clerk Collectively and/or Individually; United States Fidelity and Guaranty Company; State of Mississippi, Attorney General; and District Attorney, Circuit Court District One

Thursday, 17th day of September, 1998
Judgment affirmed. Appellant taxed with costs of appeal.

Thursday, 3rd day of December, 1998
Motion for rehearing, denied. Roberts, J., Not Participating.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Honorable Lenore L. Prather, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on December 10, 1998, A.D.

"s/ Charlotte Williams"
Clerk, Supreme Court and Court of Appeals

APPENDIX D

Petitioner called attention to the Circuit Court's commitment to allow presentation of the Rebuttal in pleadings as follows:

1. Plaintiff's Response to Motion of Pontotoc County Defendants', Individually and Officially, for Summary Judgment, p. 4, paragraph B, Plaintiff, February 26, 1997.

2. Plaintiff's Response to Memorandum Brief in Support of Motion to Dismiss by Defendants State of Mississippi; Mike Moore, Attorney General; and John R. Young, District Attorney, Circuit Court District One.

IN THE CIRCUIT COURT OF PONTOTOC COUNTY, MISSISSIPPI

CARL ZIMMERMAN PLAINTIFF

v Civil Action File No. 95 160R

PONTOTOC COUNTY, MISSISSIPPI
DEFENDANTS
BOARD OF SUPERVISORS, THEIR
ATTORNEY AND CLERK, COLLECTIVELY
AND/OR INDIVIDUALLY, ET ALL

PLAINTIFF'S MOTION TO PRESENT REBUTTAL TO ALL DEFENDANTS RESPONSES TO AMEND COMPLAINT AND REPLY TO UNITED STATES FIDELITY AND GUARANTY COMPANY'S COUNTERCLAIM

(1) COMES NOW TO THE COURT, Plaintiff to submit and file this Plaintiff's Motion to Present Rebuttal to All Defendants Responses to Amended Complaint and Reply to United States Fidelity and Guaranty Company's Counterclaim.

(2) The Plaintiff has not as yet rebutted any Defendants Responses to the Amended Complaint. This is due to two accidents suffered in March and April of 1996. Motions, first to delay proceedings was verbally responded to through the Court's Motion Clerk, that such motion would temporarily stop all proceedings, which was not desired. This was followed by Plaintiff's Motion for extension of time to serve Rebuttal to Separate Answer of Pontotoc County Defendants to Amended Complaint.

(3) This Motion was also responded to verbally through the Court's Motion Clerk, that the Plaintiff would have ample opportunity to rebut responses of all Defendants at eventual trial.

(4) Parts of, but not all of rebuttal to Pontotoc County Defendants

and State Defendants Responses to Amended Complaint were included as a part of Plaintiff's Responses to these Defendants Motion for Summary Judgment and Brief in Support thereof of Pontotoc County defendants; and to State Defendants (Attorney General and District Attorney) Motion for dismissal and memorandum brief in support thereof.

(5) The Plaintiff has been given the right by the Court through the Court's Motion Clerk by verbal message to present the rebuttals to all Defendants Responses to the Amended Complaint. This Motion is made to possibly enable presentation of such rebuttals at the same time as hearings requested in Notice of Motion by Defendant United States Fidelity and Guaranty Company; and the Plaintiff's Amended Notice of Motion.

(6) A Notice of Motion to this effect is included herewith.

RESPECTFULLY SUBMITTED:

"s/ Carl Zimmerman"
Carl Zimmerman, Plaintiff
3433 Highway 341 South
Pontotoc, Mississippi, 38863-9338
Telephone: 601-489-1392

APPENDIX E

In addition to the Rebuttal, the other documents moved to be included in the record on appeal are Briefs in Support of Motions which contain ingenious claims to get the impact thereof from the courts, but are not filed in the circuit clerk's office, and are therefore not made available to the Supreme Court of Mississippi if a case is appealed. Petitioner's Motion and Amendment thereto to present Rebuttal and court's order denying modification of the record on relevant documents are attached. Rather than agreeing to accept relevant documents, the Mississippi Supreme Court agreed to accept USF&G's questions of Discovery, first set.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Carl Zimmerman — APPELLANT
v — CASE NO. 97 TS 0694
PONTOTOC COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY, ET ALL — APPELLEES

UNITED STATES FIDELITY AND GUARANTY COMPANY

STATE OF MISSISSIPPI: AND ATTORNEY GENERAL AND DISTRICT ATTORNEY CIRCUIT COURT DISTRICT ONE

APPELLANT'S MOTION FOR MODIFICATION OF THE RECORD

(1) COMES NOW TO THE COURT Appellant to make this Motion for Modification of the Record in the above styled case pursuant to M.R.A.P. Rule 10.

(2) Clerks papers and that part of the record designated by Appellant (CP-632 to 635) which were in the file of the Pontotoc County Circuit Clerk were mailed to the Clerk of the Mississippi Supreme Court on August 28, 1997.

(3) The purpose of this Motion is to Modify the Record to include inadvertent omission by Appellant to designate Defendant USF&G's "Request for Production of Documents to the Pontotoc County Board of Supervisors and Clerk (First Set). Part of Defendant USF&G's Answers and Defenses to the Amended Complaint, dated May 7, 1996, is

a Counterclaim against Plaintiff (CP-364, 365, 366); and a cross-claim against Pontotoc County Defendants (CP-366). The Counterclaim and the cross-claim have not been withdrawn by Defendant, USF&G. The need to have this document included is the record is due to USF&G's Joinder in Motion of Pontotoc County Defendants. Its need in Arguments can best be illustrated by the historic Arabic Proverb: "The enemy of my enemy is my friend".

(4) The following documents designated by the Appellant are reported by the Pontotoc County Circuit Clerk not to be a part of the file in the Amended Complaint, Civil Action File No. 95 160R. They are not included in the Index or in the Issue Docket Entries (CP-1 through 14):

A. Item 15 (CP-633): Brief of Pontotoc County Defendants, Individually and Officially, in Support of Motion for Summary Judgment (dated 1-6-97).

B. Item 5. (CP-632): Memorandum Brief in Support of Motion to Dismiss by Defendants State of Mississippi; Mike Moore, Attorney General; and John R. Young, District Attorney of the First Circuit Court District (dated 2-5-97).

C. Item 21, CP-634): Reply Brief of Pontotoc County Defendants, Individually and Officially, in Support of Motion for Summary Judgment.

The need for the inclusion of these documents is obvious.

(5) The first response to the Amended Complaint was received from Pontotoc County Defendants on April 3, 1996. On April 5, 1996 (CP-5) Plaintiff moved to delay proceedings which was withdrawn in an April 12, 1996, Motion for an extension of time to serve rebuttal to separate answer of Pontotoc County Defendants to Amended Complaint (CP-6, 7), as recommended by the Court. The foregoing motions were the result of an accident suffered by Plaintiff on March 22, 1996, which required extensive surgery. While in the hospital recovering from surgery performed April 15, 1996, Plaintiff was advised by the Court, verbally through the Court's Motion Clerk, that Plaintiff would have ample time to rebut responses of all five defendants at trial. On May 13, 1996, Plaintiff suffered another accident which rendered both Plaintiff's upper extremities useless until mid-June. In a limited fashion, a consolidated rebuttal to all defendants responses and defenses to the Amended Complaint began in preparation and upon completion, was put aside for eventual use at the trial. (CP-467, 525), Plaintiff began to realize in early April, 1997, there was to be no trial permitted and on April 21, 1997, made motion to present the Rebuttal (CP-609/ 610) before final orders were issued under date of May 1, 1997. Initial order (CP-583) was issued under date of April 7, 1997.

Final orders (CP-628, 629A and B) were issued. Only a small part of the Rebuttal was incorporated into Pleadings of Plaintiff. The Plaintiff's Motion of April 21, 1997, has not as yet been responded to by the Court. The Rebuttal (reply brief) is an important and basic part of Plaintiff's case, and its inclusion in the record of this appeal is respectfully requested.

CONCLUSION: WHEREFORE PREMISES CONSIDERED, the Court is respectfully requested to issue an order to file the foregoing supplemental records with appropriate certification, with such identification as the Court may direct, the expense of which, at this time, will be borne by Appellant.

RESPECTFULLY SUBMITTED

"s/Carl Zimmerman"
Carl Zimmerman, Appellant Pro se,
3433 Highway 341 South
Pontotoc, Mississippi, 38863-9338
Telephone: 601-489-1392

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CARL ZIMMERMAN — APPELLANT

v — CA
CASE NO. 97 TS 0694

PONTOTOC COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK, COLLECTIVELY AND/OR INDIVIDUALLY, ET ALL — APPELLEES

UNITED STATES FIDELITY AND GUARANTY COMPANY

STATE OF MISSISSIPPI: AND ATTORNEY GENERAL AND DISTRICT ATTORNEY, CIRCUIT COURT DISTRICT ONE

AMENDMENT TO APPELLANT'S MOTION FOR MODIFICATION OF THE RECORD

(1) COMES NOW TO THE COURT, Plaintiff to make and file this Amendment to the Motion for Modification of the record.

(2) The amendment is to state the need in the record for Briefs A,

B, and C, page 2, of Appellants Motion other than the words: "The need for the inclusion of these documents is obvious". (MRAP Rule 10 Comment)

(3) As to A, Item 15 (CP-633): Pontotoc County defendants close their motion for summary judgment with: "accordingly for the foregoing reasons and for additional reasons set forth in the brief submitted herewith";

(4) As to B, Item 5 (CP-632): State defendants are shown to continue avoiding and misdirecting attention from The unconstitutionality of the offices of attorney general and district attorney;

(5) As to C, Item 21 (CP-634): Pontotoc County defendants reinstate defenses previously negated which require the action noted (CP-586).

(6) These briefs belong in the record to show that there are issues and matters therein which are not in Defendants motions and to justify Plaintiff's responses thereto which are a part of the record as Item 16 (CP-412 - 445); as Item 8 (CP-517 - 550); and as a part of Item 23 (CP-585 - 606) respectively.

(7) Due to the potential impact of this case, no pleading authorized should be rendered to be of such a nature as to be omitted therefrom.

(8) The Court is requested to suspend the briefing schedule pending resolution of the Motion for Modification (by supplementing the record) and this amendment thereto.

RESPECTFULLY SUBMITTED:

"s/Carl Zimmerman"
Carl Zimmerman, Appellant Pro se,
3433 Highway 341 South
Pontotoc, Mississippi, 38863-9338
Telephone: 601-489-1392

IN THE SUPREME COURT OF MISSISSIPPI
NO. 97-CA-00694

CARL ZIMMERMAN	APPELLANT
v.	
PONTOTOC COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS; THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY; UNITED STATES FIDELITY AND GUARANTY COMPANY; STATE OF MISSISSIPPI; ATTORNEY	APPELLEES

GENERAL AND DISTRICT ATTORNEY
CIRCUIT COURT DISTRICT ONE

ORDER

This matter has come before the Court on the Appellant's Motion for Modification of the Record and the Amendment to Appellant's Motion for Modification of the Record, and the Court having considered same, finds and orders as follows:

The Appellant seeks to include a number of documents not designated or included in the record prepared for this Court's review. The Court finds that the document designated in paragraph numbered 3 of the original motion as "Defendant USF&G's Request for Production of Documents to the Pontotoc County Board of Supervisors and Clerk (First Set) may be of some limited value, and may be included in the record upon submission of certified copies thereof, however, the remainder of the requested documents do not appear proper under M.R.A.P. 10(e), and therefore should be denied.

IT IS THEREFORE ORDERED that the Appellant's Motion for Modification of the Record is granted to the extent of allowing the Appellant to submit certified copies of the discovery document set out hereinabove, however, the remainder of the motion and amendment thereto to include certain trial briefs is denied. The Appellant shall have fifteen days from date of entry hereof to submit a certified copy of the requested document, "USF&G's Request for Production of Documents to the Pontotoc County Board of Supervisors and Clerk (First Set). All costs hereof are assessed to Appellant.

IT IS FURTHER ORDERED that the briefing schedule be suspended during said fifteen day period.

SO ORDERED, this, the 22nd day of October, 1997.

"s/ James W. Smith, Jr."
FOR THE COURT

Filed
October 24, 1997
Charlotte B. Williams, Clerk
Supreme Court
Court of Appeals

DISTRIBUTION OF COSTS (INTEREST TO BE ADDED)
PERSONALLY, WITHIN 3-YEAR STATUTE OF LIMITATIONS

COUNT	HERRING	SIMMONS	BENJAMIN	PENNINGTON	ROYE	TUTOR	THOMAS	COLLUMS	TOTAL
1	$ 7.03	$ 7.03	$ 7.03	$ 7.03	$ 7.03	$ 7.03	–	$ 7.02	$ 49.20
2	32.46	32.46	32.46	32.46	32.45	32.45	–	32.46	227.20
3	.81	.81	.80	.80	.81	.81	.81	.81	6.46
4	(1992) .65	.65	.66	.66	.66	–	.65	.65	4.58
5	.38	.38	.38	.38	.38	.38	–	.38	2.66
12 - B Tax Levy									
1995	17.37	17.37	17.37	17.37	17.37	17.37	–	17.37	121.59
1994	17.06	17,06	17.07	17.07	17.07	17.07	–	17.07	119.47
1993	19.92	19.91	19.91	19.91	19.91	19.91	–	19.91	139.38
TOTAL	$95.68	$95.67	$95.68	$95.68	$95.68	$95.02	$ 1.46	$95.67	$670.54

FROM U.S.F. & G. BONDS, BEYOND STATUTE OF LIMITATIONS

COUNT	HERRING	SIMMONS	BENJAMIN	PENNINGTON	ROYE	ANDERSON	SEALE	COLLUMS	TOTAL
4 1998 12-B Tax Levy	3.06	3.06	3.05			$ 3.05	$ 3.05	3.05	$ 18.32
1992	26.15	26.16	26.16	26.16	26.15			26.15	156.93
1991	25.84	25.83	25.83			25.83	25.83	25.83	154.99
1990	26.01	26.01	26.01			26.01	26.01	26.01	156.06
1989	25.93	25.94	25.94			25.94	25.94	25.94	155.63
1988	25.95	25.95	25.95			25.96	25.96	25.96	155.73
TOTAL	$132.94	$132.95	$132.94	$26.16	$26.15	$106.79	$106.79	$132.94	$797.66

ASSIGNMENT OF PROPORTIONATE SHARE

Defendant	Amount
Attorney General and District Attorney	$100,000.00
Three Rivers Planning and Development District	40,000.00
Three Rivers Solid Waste Management Authority	40,000.00
Ronald E. Bell	20,000.00
Mississippi Department of Environmental Quality	50,000.00
State of Mississippi	50,000.00
	$300,000.00

Board of Supervisors, 1992 - 1995 Term:

K. Herring	$14,285.72	
B. N. Simmons	14,285.72	
L. Benjamin	14,285.71	
J. Pennington	14,285.71	
J. Roye	14,285.71	
C. Thomas	2,678.57	
P. Tutor	11,607.15	
R. Collums	14,285.71	
TOTAL	$100,000.00	$100.000.00

Board of Supervisors, 1988 - 1991 Term:

K. Anderson	14,285.72	
K. Herring	14,285.71	
L. Benjamin	14,285.71	
J. R. Seale	14,285.71	
C. Thomas	14,285.72	
B. N. Simmons	14,285.71	
R. Collums	13,285.72	
TOTAL	$100,000.00	$100,000.00
	GRAND TOTAL	$500,000.00

Interest to be added.

PROPORTIONATE SHARE OF PLAINTIFF'S COSTS

To reimburse Plaintiff for costs sustained and incurred from inception to filing of amended complaint:

Through 1-21-96:

Hours 248.25 @ $50.00 = $12,412.50	
Out of Pocket Expense	678.18
Estimated: Hours to filing 25 @ $50.00	1,250.00
Out of Pocket, copying	225.00
Serving Summons	500.00
Total	$15,065.68

Assignment of costs:

Attorney General	$3,013.14
Three Rivers	1,205.26
Authority	1,205.25
R. E. Bell	602.62
DEQ	1,506.57
State of Mississippi	1,506.57
Board of Supervisors	6,026.27
TOTAL	$15,065.68

Board of Supervisors, 1992 - 1995 Term

K. Herring	$ 430.45
B. N. Simmons	430.45
L. Benjamin	430.45
J. Pennington	430.45
J. Roye	430.44
C. Thomas	80.65
P. Tutor	349.80
R. Collums	430.45
TOTAL	$3,013.14

Interest to be added to each amount

Board of Supervisors, 1988 - 1991 Term:

K. Anderson	$430.45
K. Herring	430.45
L. Benjamin	430.45
J.R. Seale	430.44
B. N. Simmons	430.45
C. Thomas	430.45
R. Collums	430.44
TOTAL	$3,013.13

FROM THE LAND OF HANGING GRAPES

3433 Highway 341 South
Pontotoc, Ms., 38863
Wednesday, December 14, 1994

Grady Tolloson, Jr., Chairman
Mississippi Judicial Advisory Study Committee
c/o Administrative Office of Courts
P. 0. Box 117
Jackson, Ms., 39205

Sir:

The charge of the Committee is to study and make recommendations relative to the Judiciary Department of the State of Mississippi, particularly the courts.

One of my 17 recommendations made November 30, 1994, at the Tupelo, Mississippi "Public Forum on the Courts" was for a unified State Court system to include all courts in the state. This would require several constitutional changes only insofar as Chancery and Circuit Courts are concerned to eliminate the separate jurisdictions noted several places in the Mississippi Constitution, Article 6, Judiciary. The recommendations on the Supreme Court appear to be no problem as recommended or in a unified court system. Neither do the Family, Justice, County, and municipal courts are created by law, as well as the new Court of Appeals. Upgrading of judges of the justice courts from a high school diploma or a GED should be no problem as those appear to be minimum requirements Article 6, Judiciary, Section 171.

The presentation included the office of Attorney General and District Attorney as they are also part of the Judiciary in Mississippi.

We have a disagreement as to which branch of government the county boards of Supervisors belong in. You claim Executive, I replied with "Judiciary". If you review the construction of the Mississippi Constitution of 1890, you will find the boards of supervisors were created as part of the Judiciary, Section 170, contained in the Constitutions of 1832 and 1869. This has been confirmed by the Mississippi Supreme Court, *Haley v State,* 198M 899 67 So498: "The boards of supervisors of the several counties are a part of the judicial department of the state."

No matter how many times it is repeated they are a part of the Executive branch, can the fact they are a part of the Judiciary be changed, until the Constitution is changed.

Until the early 1900's, proceedings of boards of supervisors usually always closed with "Court Adjourned at _____." Boards of

supervisors are first mentioned in the Constitutions of 1832, and again in 1869 with "full jurisdiction over roads, ferries, and bridges," and to "perform such other duties as required by law" This is not in violation of the separation of powers of the Mississippi Constitutions of 1832 and 1869 as the separation of powers provisions of those constitutions contained wording to the effect "except in instances hereinafter expressly directed or permitted". This all changed when the Constitution of 1890 was adopted for the people on November 1, 1890. The foregoing words were eliminated and the concise and explicit words, "The acceptance of an office in either of said departments, shall, of itself, and at once vacate any and all offices held by the person so accepting in either of the other departments."

With the above, the duties and offices cannot intermingle magistracies. Effective November 1, 1890, the "such other duties as may be required by law" could be only those of the judicial magistry.

This has not been challenged, but it definitely appears that any duties other than judicial required by law or performed by boards of supervisors that are not judicial in nature, are contrary and repugnant to the Mississippi Constitution of 1890. Boards of supervisors perform only executive and legislative functions and this combination is also unconstitutional. That is one of the many reasons an initiative is sponsored to enable a new constitution. And this is why they were contained in the presentation, a full copy of which was provided the Administrative Director of the Administrative Office of Courts on November 30, 1994.

As a part of the Judiciary, the boards of supervisors should be included in your study and recommendations to the Legislature.

Sincerely.

For the best in a participatory
Democratic Society
"s/ Carl Zimmerman"
Carl Zimmerman
601-489-1392

cc: Martin T. Smith

GENERAL OUTLINE OF TITLES AND CHAPTERS

CONSTITUTION OF THE UNITED STATES ..... Volume 1
CONSTITUTION OF MISSISSIPPI ..... Volume 1

TITLE 1. LAWS AND STATUTES

		Beginning Section
Chapter 1.	Code of 1972	1-1-1
3.	Construction of Statutes	1-3-1
5.	Session Laws and Journals	1-5-1

TITLE 3. STATE SOVEREIGNTY, JURISDICTION AND HOLIDAYS

Chapter 1.	State Sovereignty Commission [Repealed]	3-1-1
3.	State Boundaries, Holidays, and State Emblems	3-3-1
5.	Acquisition of Land by United States Government	3-5-1

TITLE 5. LEGISLATIVE DEPARTMENT

Chapter 1.	Legislature	5-1-1
3.	Legislative Committees	5-3-1
5.	Interstate Co-operation	5-5-1
7.	Lobbying	5-7-1
9.	Agency Review	5-9-1
11.	Abolishment of Agencies	5-11-1

TITLE 7. EXECUTIVE DEPARTMENT

Chapter 1.	Governor	7-1-1
3.	Secretary of State	7-3-1
5.	Attorney General	7-5-1
7.	State Fiscal Officer; Department of Audit	7-7-1
9.	State Treasurer	7-9-1
11.	Secretary of State; Land Records	7-11-1
13.	Mississippi Administrative Reorganization Act	7-13-1
15.	Executive Branch Reorganization Study Commission [Repealed]	7-15-1
17.	Mississippi Executive Reorganization Act of 1989	7-17-1

TITLE 9. COURTS

Chapter 1.	Provisions Common to Courts	9-1-1

The preceding page is identified Executive Department

CHAPTER 5
Attorney General

SEC.

7-5-1 Qualifications, election, and duties.
7-5-3. Deputy attorney general.
7-5-5. Assistants to the attorney general.
7-5-7. Special counsel and investigators.
7-5-9. Additional employees.
7-5-11. Revisor of statutes.
7-5-13. Additional assistants to handle legal affairs of Highway Commission.
7-5-15. Secretaries.
7-5-17. Office hours.
7-5-19. Office space, supplies, and equipment.
7-5-21. To keep a docket.
7-5-23. To keep an opinion-book.
7-5-25. To give opinions in writing.
7-5-27. To approve accounts against the state.
7-5-29. To attend the supreme court.
7-5-31. Failure to attend supreme court.
7-5-33. To enforce judgments and pay over collections.
7-5-35. May institute and prosecute suits to vacate fraudulent conveyances.
7-5-37. To prosecute suits.
7-5-39. To represent the state and state officers in suits.
7-5-41. To receive certified copies of pleadings.
7-5-43. May advise public officials and employees investigated or sued as result of discharging duties.
7-5-45. May advise school officials and employees in proceedings challenging validity of statute.
7-5-47. Suits on bonds of state officers.
7-5-49. To advise public service commission.
7-5-51. To represent state tax and public service commissions.
7-5-33. To assist district attorneys.
7-5-54. Prosecution of official corruption and other white collar crimes.
7-5-55. To recover taxes.
7-5-57. To draw papers.
7-5-59. Investigation of official corruption and other white collar crimes.
7-5-61. Books of Account and deposit of funds.

7-5-63. Reports to the legislature.
7-5-65. Saving statute.
7-5-66. Prepayment of costs in civil actions for recovery of delinquent sums owed to Mississippi Guaranteed Student Loan Program.

§ 7-5-1. Qualifications, election, and duties.

The Attorney General provided for by Section 173 of the Mississippi Constitution shall be elected at the same time and in the same manner as the Governor is elected. His term of office shall be four (4) years and his compensation shall be fixed by the Legislature. He shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with

Copied from the Autobiography of Robert Harvey Thompson by R. H. and Fulton Thompson, Mississippi Department of Archives and History, Call No. Z-1067, pages 63 through 69.

County by whom I was not as well known as by those of my home county.

The Constitutional Convention of 1890 met as provided by law, August 12th of that year. The issues it had to solve were momentous; they involved, if not the life, the integrity of the state. The large majority or ignorant and unworthy voters, under the control or evilly disposed men, had to be overcome by lawful means and the purity of the ballot box maintained. There was no precedent to guide the convention in its action on the principal purpose for which it was called. The act of Congress readmitting Mississippi to the Union after reconstruction expressly provided that suffrage in this state should never thereafter be more limited than was done by its reconstruction constitution of 1869; that constitution granted almost perfect manhood suffrage. Had the act or Congress been valid the convention of 1890 would have been powerless to have accomplished the main purpose for which it was held. After due deliberation and consideration the Convention held the mentioned act of Congress to be utterly void; this was done upon an authoritative judicial decision of the United States Supreme Court. In an address delivered by me at the 1923 meeting of the Mississippi State Bar Association, published in its minutes, I fully stated the facts, involving an interesting piece or our state's history, warranting the convention's conclusion that the act of Congress was of no effect.

The next formidable obstacle to the Convention's purpose was the fifteenth amendment to the constitution of the United States, providing: "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

The delegates to the convention fully recognized that any provision of the state constitution they were formulating violative of the fifteenth amendment of the Federal Constitution would be fatal to the accomplishment or the main purpose of the convention; therefore that main purpose had to be accomplished by circumventing and not violating it. If ever man's brains were puzzled to solve a difficulty, the wits of the delegates to the convention were surely taxed for ways and means to accomplish their main purpose. It was, however, accomplished by Anglo-Saxon ingenuity; for this we have the statement of the United States Senator Hoar of Massachusetts. He had been the chairman of a committee of the United States Senate charged to investigate Mississippi elections of 1875 and for several other years. His committee condemned them in forceful terms as having been unlawful. It was credit-

ably reported that at the first opportunity he read Mississippi's new constitution, hoping to find reasons for its invalidity; having carefully read it he threw it on a table before him, saying: "Anglo-Saxon ingenuity can do anything."

The Constitutional Convention forcibly illustrated the fact that the combined wisdom or a considerable body of men is superior to the wisdom of its wisest member or of the wisest of any number or its membership less than all of them. One man did not dominate the convention; a coterie did not do so; the delegates to the convention, with but few, if any, exceptions, were of decidedly intellectual and moral worth; they were elected to solve momentous and vital state issues if which the voters were aware and, as usual, in such cases, the electors favored candidates superior to the average members of ordinary legislative sessions. Almost every delegate to the convention, if not each of them, contributed something of value to the beneficial results attained by the convention. United States Senator J. Z. George was an able and influential delegate to the convention, but did not dominate it, as sometimes asserted; he deserves great credit, first, for having been largely instrumental in promoting the call for the convention; second, for the intense interest he took in the proceedings of the convention; and especially, third, for the masterly defense he made of the constitution when assailed in the United States Senate; he was a great man. As a delegate to the convention I took great interest in its proceedings and feel assured that I did my duty. I was appointed a member of the convention's Legislative Committee and acted as its chairman; the members of the committee gave me credit as having been largely instrumental in controlling its actions and in formulating its report to the convention; that report having been adopted now constitutes Article 4, entitled "Legislative Department" of the constitution; I presented the report to the convention, took care of it and secured its approval and the adoption of its several sections by the convention. During the committee's sessions several of its members, including myself, were in frequent conference with members of the Franchise Committee resulting in Section 256 of the constitution being adopted; that section by a gerrymander of the state made it practically certain that a large majority of the legislative House of Representatives would be elected favorable to the best interest of the state; that section with sections 140 and 143 constitute valuable parts of the franchise provisions of the constitution; this surprisingly seems to be overlooked by even sprightly young persons of this day and time.

I was greatly pleased and complimented by being appointed shortly preceeding the close of the convention chairman of the Revision Committee, charged with the duty of carefully examining each section of

the constitution passed by the convention, to correct, when proper, its verbiage; detecting any conflicts or seeming ones to be found in different sections and generally without changing legal effect, to improve its composition; the committee performed its duties to the entire satisfaction of the convention.

Of the one hundred and thirty four delegates to the Constitutional Convention I am now one of the four surviving members; the other three are: Hon. J. W. Cutrer, delegate from Coahoma County; Hon. John E. Gore, delegate from Webster County, and Hon. Will T. McDonald, delegate from Benton County, now of Memphis, Tennessee.

In December 1890 after the constitution of that year became operative, in pursuance of its section 278, the governor, John M. Stone, appointed me chairman of a commission to formulate and present to the legislature for enactment, a new code of laws, necessary and proper to conform the general statutes of the state to the new constitution. Two other commissioners were appointed; they were Hon. George G. Dillard of Macon, Noxubee County; and Hon. Robert B. Campbell of Greenville, Washington County. All of the Code Commissioners had been delegates to the Constitutional Convention. The commissioners met early in January 1891 and at its first meeting duly considered their duties. Commissioner Campbell did not agree with the other two commissioners touching the scope or their duties, and therefore took little interest in their work. He did, however, on a visit to his co-commissioners at their request, perform duty on a segregated subject during two hours; his work was admirably done. It was perfect and was placed in the code just as he wrote it. His co-commissioners regretted that Mr. Campbell did not render them greater aid. Commissioners Dillard and Thompson began earnest work on the code to be formulated early in January 1891 and devoted practically all, surely three-fourths or their time to their duties during the whole of that year. The "Prefatory" to the Code or 1892, written by me, contains an account of their labors to which the reader is referred.

When the legislature met in January 1892 the Code as prepared by the commissioners was submitted to it for consideration and adoption. The House of Representatives by resolution invited me to occupy a seat in its chamber while in session, granting me the right to be heard on all questions relating to the code. The invitation was accepted. Commissioner Dillard was a member or the State Senate and, of course, had all the rights of any other senator. The facts just stated were fortunate; the commissioners being thoroughly conversant with the provisions or the code as a whole were enabled to and did prevent the adoption of needless amendments to several sections of the code by point-

ing out that the subjects of the proposed amendments, seemingly of merit, were provided for in other parts or the code.

No man was ever treated more kindly and courteously by a legislative body than I was treated by the House of Representatives of 1892. One of the first amendments offered to the Code was deemed by me as of merit. I expressed myself to that effect and recommended its adoption. This convinced the legislators that I did not claim the proposed code to be beyond improvement and secured me the confidence of the representatives; thereafter the legislators, nearly all of them, who conceived of an amendment; to any part or the code, reduced the same to writing and submitted it to me before introducing it; if I were able to point out that the amendment was either needless or improper, no such amendment was introduced. Mr. Dillard's experiences in the Senate was much the same as my own in the House. Very few amendments, and they were improvements, were made to the proposed code except to the chapter on "Primary Elections", wherein politics rather than statesmanship seemed to be controlling; that chapter was so largely amended that the commissioners, by a footnote to it disclaimed responsibility for its provisions.

The code being adopted, the legislators placed on me the duty to index it and to supervise its publication. This I did; it consumed much time and labor.

I was much gratified by the fact that my index to the code met the approval and commendation of the bench and bar of the state, as did the code itself.

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL
OFFICIAL ATTORNEY GENERAL'S OPINION

MIKE MOORE
ATTORNEY GENERAL

October 11, 1993

Marion Smith, Esq.
Adams County Board Attorney
Post Office Box 1307
Natchez, MS 39121-1307

RE: GARBAGE COLLECTION SERVICES

Dear Mr. Smith:

Attorney General Mike Moore has received your letter of request and has assigned it to me for research and reply. Your letter poses the following matter for consideration:

> Following the meeting which the Adams County Board representatives had with you on July 2nd, on July 6th, your office rendered two new opinions, *Scott* and *Harris*. I am concerned that each new opinion makes it increasingly difficult for a county or municipality to discharge the obligations imposed by the non-hazardous waste disposal statutes of the state.
>
> To be more specific, the *Scott* opinion of July 6th interprets Amended Section 17-7-227 to preclude collection charges from a single family generator of non-hazardous solid waste where that generator has "otherwise contracted" for disposition. I suggest that this section permits a county or municipality to collect

fees to defray the cost of a collection system of non-hazardous waste from each single family residential generator without regard to whether or not the single family generator has otherwise contracted for the disposition. The *Scott* opinion omits the conjunction "and" and following language which provides for the collection fees from industrial, commercial and multi-family residential generators who have not otherwise contracted for the collection. It suggested that the otherwise contracted provision

applies to industrial, commercial and multi-family generators and not to single family residential generators. Had the "otherwise contracted" language been intended by the Legislature to apply to single family residential generators, this could certainly have been clearly stated in senate Bill 2376.

This letter is written as a request for your reconsideration of the aforementioned Scott opinion of July 6, 1993, which interpreted the amended Code Section 7-7-227.

The meaning of Miss. Code Ann. Section 17-17-227(4) is not clear and needs to be clarified by the legislature. Meanwhile, recognizing the substantial burden counties and cities are confronted with regarding compliance with recent state and federal solid waste management mandates, and after extensive consultation with the legislative leadership involved in drafting the Section 17-17-227(4) language, we have determined that your request for reconsideration of the Scott opinion is well taken.

Mississippi Code Ann. Section 7-17-227(4) (Supp. 1993) provides inter alia:

"From and after the submission of a local nonhazardous solid waste management plan to the Commission, the governing body

of each county or municipality which has established a nonhazardous solid waste collection system and which is assessing and collecting fees to defray the costs of such system, may assess and collect such fees from each single family residential generator of nonhazardous solid waste and may also assess and collect such fees from each industrial, commercial and multi-family residential generator of nonhazardous solid waste for any time period which such generator has not otherwise contracted for the collection of nonhazardous solid waste that is ultimately disposed of at a permitted or authorized nonhazardous solid waste management facility." (Emphasis added)

Examination of this language reveals that the county and municipal governing boards may assess garbage collection fees against two categories of nonhazardous solid waste generators These two categories are:

(1) "each family residential generator of nonhazardous solid waste", and

(2) "each industrial, commercial and multi-family residential generator of nonhazardous solid waste for

any time period which such generator has not otherwise contracted for the collection of nonhazardous solid waste . . ." (Emphasis Added).

A plain reading of the statute, as you suggest in your letter of request, and as confirmed by the legislative leadership involved in drafting the provision in question, does appear to except from fee assessments "each industrial, commercial and multi-family residential generator" that has "otherwise contracted" for qualified collection services elsewhere. The exception from fee assessments does not appear to apply to "family residential generator". Lending further support to this

interpretation, we also recognize that historically, it has been common practice for heavy generators of garbage, such as multi-family apartments, businesses, and industry, to contract for private collection services due to inability of public collection services to handle the volume or frequency of collection needs. At least until recently, such practice was not common among single family residential generators.

For the reasons stated hereinabove, the prior opinion of this office to Representative Morris Lee Scott is hereby withdrawn.

Sincerely yours,
MIKE MOORE, ATTORNEY GENERAL

BY: "s/Samuel W. Keyes, Jr."
Samuel W. Keyes, Jr.
Deputy Attorney General

Miss, Code Ann. §17-17-61. Note this section was repealed as of July 1, 1994, and is quoted here in its entirety as it may not appear in current supplements to the Annotated Code of Mississippi.

§17-17-61. Procedure for collecting garbage collection and disposal fees.

"(1) In addition to any other remedies for the collection of garbage service fees, the fees and charges for collecting and disposing of garbage and rubbish may become an assessment upon the real or personal property or motor vehicle of any user of the services. Such charges and fees may become an assessment upon the real property where the garbage was collected regardless of whether the person who incurred the fees was the owner of the real property, a tenant or some other party.

"(2) The board of supervisors or the municipal governing authority shall hold a hearing to determine if the owner or tenant of the real property has failed or refused to pay the fees for collecting or disposing of garbage or rubbish from the site of such real property. Notice of such hearing shall be given to the owner or tenant, if any, of such real property by United States registered mail or certified mail, or by any method authorized by the Mississippi Rules of Civil Procedure for service of process of chancery or circuit courts; or if the property owner is unknown or his address unknown, by publication in a newspaper having general circulation in the county. If service is by publication, at least two (2) weeks' notice must be given. With all other methods of service, at least three (3) weeks' notice must be given. If, after such hearing, it is determined that such fees and charges have not been paid, the board of supervisors or municipal governing body may adjudicate by resolution a penalty in an amount not to exceed twenty-five percent (25%) of the total of such fees and charges to be added to the amount of such fees and charges. Such fees and charges, together with any penalty, may become an assessment against the real or personal property or motor vehicle of the user of the property who incurred the fees or the owner of that property.

"(3) The action authorized shall not be undertaken against any one (1) parcel of real or personal property or one (1) motor vehicle more than three (3) times in any one (1) calendar year, and the total assessment against such real or personal property or motor vehicle shall not, at any one (1) hearing, amount to more than the total charges for such collection and disposal services to the real property for a single year, plus any penalty that may be imposed.

"(4) Hearings shall be conducted under oath and shall be recorded verbatim stenographically by a court reporter or electronically. The board of supervisors or municipal governing authority may designate

a hearing officer to conduct such hearings as are described in this section. Any such hearing officer must be a member of the board of supervisors, the municipal governing authority or a member of the Mississippi Bar. A hearing officer who is not a member of the board of supervisors or municipal governing authority may be compensated for his services. The hearing officer shall submit his findings and recommended decision, along with the record, to the board or governing authority, which may accept or reject such findings and recommendation without an additional hearing, and such action shall be considered a final and conclusive action of the board of supervisors or governing authority unless an appeal is taken as herein provided. The person aggrieved by a decision of the board of supervisors or municipal governing authority may appeal as provided in Section 11-51-75, Mississippi Code of 1972.

"(5) The assessment shall be a lien against real or personal property or motor vehicle and may be enrolled in the office of the circuit clerk as other judgments are enrolled.

"(6) Upon the filing of the lien the county or city shall mail a notice of filing to such person setting forth the procedure for satisfying the lien and other methods of collection may be exercised if the fees are not paid.

"(7) The lien created by this section shall continue from the date of filing until satisfied, except that no action to enforce it may be brought more than ten (10) years after the date on which service was furnished or more than three (3) years after the date of the person's death. Failure to bring action within such times be a complete bar against recovery and shall extinguish the lien. A lien shall be valid from the time of filing.

"(8) Liens created by this section may be discharged as follows:

(a) By filing with the circuit clerk a receipt or acknowledgment, by the county, that the lien has been paid or discharged;

(b) By depositing with the clerk the money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(c) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed.

"(9) No real or personal property or motor vehicle shall be sold to satisfy any such assessment or lien.

"(10) If the county tax collector determines that any person who has a lien filed for failure to pay any solid waste collection and/or disposal fees or charges does not have any taxable real property assessed or located in the county, such lien shall attach to any motor vehicle owned by such person within the county. Once such a lien is filed, a motor vehicle road and bridge privilege license shall not be issued or renewed

until all delinquent solid waste collection and/or disposal fees or charges are paid and the lien satisfied in addition to any other taxes or fees assessed against the motor vehicle."

Mississippi Code Annotated §11-39-1 and §11-39-3

"§11-39-1. To what cases applicable.

The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz:

First.- Whenever any person unlawfully holds or exercises the functions of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office.

Second.- Whenever any public officer has done or suffered to be done, or has omitted to do any act, the doing or omission of which works a forfeiture of office.

Third.- Whenever any two or more persons shall act as a corporation, or assume so to do without being legally incorporated.

Fourth.- Whenever any corporation shall be guilty of a misuser or abuse of its powers, or ceases to discharge the duty for which it was created.

Fifth- Whenever any corporation willfully exercises powers not conferred by law.

Sixth.- Whenever any corporation fails to exercise powers conferred by law and essential to its corporate existence, or implied in its duty to the public.

Seventh.- Whenever any corporation shall be guilty of doing or neglecting to do any act the doing or neglecting of which is made by law a cause of forfeiture of franchise.

Eighth.- Whenever any corporation shall willfully and persistently violate the law made for regulating such corporations, or the criminal law; but acts done in good faith before adjudication of the constitutionality of a doubtful statute shall not be a cause of forfeiture.

Ninth.- Whenever it is sought to have the right of any corporation, not created by the laws of the state, to do business in this state forfeited because of its persistent refusal to comply with the laws thereof.

Tenth.- Whenever any nonresident alien or corporation shall acquire or hold lands contrary to law."

"Section 11-39-3. Proceedings - how and where.

The proceedings set forth in Section 11-39-1 shall be by information in the name of the state, by the attorney general or a district attorney, on his own motion or on relation of another, and, in a case to try the right to an office, on the relation of the claimant thereof. The information shall be filed in the circuit court of the county of the residence of the defendant, or, in the case of an officer, where the acts of such, or, in case of a corporation or pretended corporation, where the principal office or place of business may be or where it may transact any busi-

ness and has an agent; or, in case of an alien or corporation acquiring or holding land contrary to law, where any of the land is situated."

Mississippi Code Annotated §11-46-1(b)

"(b) "Claimant" means any person seeking compensation under the provisions of this chapter, whether by administrative remedy or through the courts."

Mississippi Code Annotated §11-46-7(1)

"§11-46-7(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary."

Mississippi Code Annotated §11-46-7(3)

"(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any claim against any employee for money damages arising out of any act or omission within the course and scope of his employment, provided however, that to the extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligations shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee."

Miss. Code Ann, §11-46-9

"§11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

"(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction or administrative action or inaction of a legislative or judicial nature ;

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care and reliance upon, or in the execution or performance of, or in the failure to execute, or perform, a statute, ordinance or regulation, whether or not the statute, ordinances or regulation be valid;

(c) Arising out of any act or omission of an employee of a governmental entity in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failure to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise or discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or the failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine

whether such quarantine relates to persons or property.

(l) Of any claimant who is an employee of a government entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the government entity by which he is employed;

(m) Of any claimant who is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including but not limited to any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USC 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to any public property, including but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances; or

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental

entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of dangerous condition which is obvious to one exercising due care.

"(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive or dormant;

(b) Receives no revenue;

(c) Has no employees;

(d) Owns no property.

"(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter."

Mississippi Code Annotated §11-46-11(1)

"(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity, provided, however that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity, and, if the governmental entity is participating in a plan administered by the board pursuant to Section 11-46-7(3), such chief executive officer shall notify the board of any claims filed within five (5) days after the receipt thereof."

Mississippi Code Annotated §11-46-11(3)

"(3) All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for the period of ninety-five (95) days. The limitations period provided herein shall control and shall be exclusive in all actions subject to and brought under the provisions of this chapter, not withstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under

the provisions of this chapter."

Mississippi Code Annotated §11-46-13 (1)

"(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law."

Mississippi Code Annotated §11-46-13(2)

"(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that would otherwise apply."

Mississippi Code Annotated §11-46-15(1)

"(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

"(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars ($50,000.00);

"(b) For claims or causes of action arising from acts or omissions occurring on or after July I, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars ($250,000.00);

"(c) For claims or causes of action arising from acts or omissions occurring after July 1, 2001, the sum of Five Hundred Thousand Dollars ($500,000.00)."

Mississippi Code Annotated §11-46-15(3)

"(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to the costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability pro-

vided for in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section."

Mississippi Code Annotated §11-51-75

"§11-51-75. Appeal to circuit court from board of supervisors, municipal authorities.

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment or decisions in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities. Costs shall be awarded as in other cases. The board of supervisors or municipal authorities may employ counsel to defend such appeals, to be paid out of the county or municipal treasury. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of either party and written notice for ten (10) days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending unless the judge in his order shall otherwise direct.

Provided, however, that no appeal to the circuit court shall be taken from any order of the board of supervisors or municipal authorities which authorizes the issuance or sale of bonds, but all objections to any matters relating to the issuance and sale of bonds shall be adjudicated and determined by the chancery court, in accordance with sections 31-13-5 to 31-13-11, both inclusive, of the Mississippi Code of 1972. And all rights of the parties shall be preserved and not foreclosed, for the hearing before the chancery court, or the chancellor in vacation. Provided, further, nothing in this section shall affect pending legislation."

Mississippi Code Annotated §11-51-77

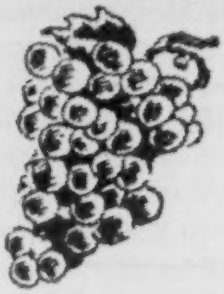
"§11-51-77. Appeal from assessment of taxes - attorney general, district attorney, county attorney may appeal.

Any person aggrieved by a decision of a board of supervisors or the municipal authorities of a city, town or village, as to the assessment of taxes, may, within ten days after the adjournment of the meeting at

which such decision is made, appeal to the circuit court of the county, upon giving bond, with sufficient sureties, in double the amount of the matter in dispute, but never less than one hundred dollars, payable to the state, and conditioned to perform the judgment of the circuit court, and to be approved by the clerk of such board, who upon the filing of such bond, shall make a true copy of any papers on file relating to such controversy, and file such copy certified by him, with said bond, in the office of the clerk of the circuit court, on or before its next term. The controversy shall be tried anew in the circuit court at the first term and be a preference case, and, if the matter be decided against the person who appealed, judgment shall be rendered on the appeal bond for damages at the rate of ten per centum on the amount in controversy and all costs. If the matter be decided in favor of the person who appealed, judgment in his favor shall be certified to the board of supervisors, or the municipal authorities, as the case may be, which shall conform thereto, and shall pay the costs. The county attorney, the district attorney, or the attorney general, if the state, county or municipality be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty days after the adjournment of the meeting at which such decision is made, or within twenty days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the state tax commissioner by within twenty days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the state tax commission is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as hereinbefore provided, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section."

COUNTY OF PONTOTOC
POST OFFICE BOX 209
PONTOTOC, MISSISSIPPI 38863
"Land of Hanging Grapes"

REGGIE COLLUMS
CHANCERY CLERK
PHILLIP L. TUTOR
ATTORNEY
PHONE
489-3900
COURTHOUSE BUILDING



BOARD OF SUPERVISORS
KEITH HERRING - PRESIDENT
DISTRICT ONE
LEIGHTON BENJAMIN
DISTRICT TWO
JOE PENNINGTON
DISTRICT THREE
JIMMY ROYE
DISTRICT FOUR
BILLY NEAL SIMMONS -
VICE-PRESIDENT
DISTRICT FIVE

February 28, 1995

Mr. Carl Zimmerman

Dear Mr. Zimmerman:

This letter will confirm your hearing that was conducted on this date. You waived any requirements of additional notice, and stated that you wanted to proceed with the hearing. As hearing officer, I considered the oral and written matters presented to me by each side.

Based upon my interpretation of the applicable law, it is my opinion that you as a regular residential generator of solid waste, owe the solid waste fees in question. The county provided residential pick-up services available to you during the time in question. It appears that the official opinion of the Mississippi Attorney General supports this decision.

Accordingly, your appeal is dismissed.

Sincerely Yours

"s/ Billy Neal Simmons"
Billy Neal Simmons
Hearing Officer

ORDER OF THE BOARD OF SUPERVISORS OF PONTOTOC COUNTY, MISSISSIPPI

WHEREAS, on this date the Board of Supervisors did acknowledge that a hearing was held for complainant, Carl Zimmerman, by hearing officer, Billy Neal Simmons, and that a decision was made by him in accordance with his letter attached hereto as Exhibit "A".

SO ORDERED, this the 28th day of February, 1995.

"s/ Keith Herring"
President, Board of Supervisors
Pontotoc County, Mississippi

Attest:

"s/ Reggie Collums"
Clerk, Board of Supervisors
Pontotoc County, Mississippi

COUNT SIX

The Defendant in this count is the Board of Supervisors of Pontotoc County, Mississippi, collectively as an entity of government.

Count 6 - A: The Defendant, as evidenced in Exhibit W, intends to impose a fee on the Plaintiff for household garbage and/or rubbish pickup whether or not they participate with county pick up service. This is in violation of the Host County Agreement, Exhibit AC-3, item 2.e. The intent of the Defendant is evidenced in Exhibit Z-2.

Argument: Even though Exhibit Z-2 is not a legal notice it does show the intent of the Defendant as stated above. This is contrary to Sections 19-5-21 (2) and (5) and is also contrary to Exhibits S, X-1, and Y.

Reference to the Host County Agreement, in this instance, should not, in any way, be construed that the Plaintiff acquiesces that it is a legitimate document or that Three Rivers Solid Waste Management Authority is a constitutionally valid entity of government, being a political subdivision of the state.

The words "charge" and "fee" as used in the documents in connection with this cause and the statutes which govern, generally and almost exclusively use the word as follows: "charge" – for accepting solid waste at a disposal site or delivering or transporting waste to or from a transfer station, "fee" for a service rendered by Defendants for picking up and disposing of such waste.

This count is permitted under M.R.C.P. Rule 57 (b) (1) and (2) for adjucation in a cause (this count) that has not reached the stage at which either party may seek a coercive remedy.

CONCLUSION COUNT SIX: The Plaintiff contends the specific relief requested is required by the Host County Agreement, that Section 19-5-21(4) permits this, and that the Attorney General's Opinion dated October 11, 1993, EXhibits R-13, R-14, and R-15 as will be addressed in COUNT THIRTEEN is fatally flawed in that it is not only invalid, but has been issued contrary to the Provisions of the Mississippi Constitution. The specific remedy (relief) requested in this count, COUNT SIX, is a determination by the court that the Plaintiff can deliver all his household garbage and/or rubbish to the designated point, wherever it may be, at no charge therefor and not be subject to the monthly fee for pickup and disposal of household garbage and/or rubbish.

"Section 156. The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

"Section 159. The chancery court shall have full jurisdiction in the following matters and cases, viz.:

"(a)All matters in equity;

"(b) Divorce and alimony;

"(c) Matters of testamentary and of administration;

"(d) Minor's business;

"(e) Cases of idiocy, lunacy, and persons of unsound mind;

"(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation."

"Section 160. And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought although the legal remedy may not have been exhausted or the legal title established by a suit at law."

"Section 161. And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect and of suits involving inquiry into matters of mutual accounts; but if plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it may appear that the accounts to be investigated are mutual and complicated."

Miss. Code Ann. §19-3-23

"§19-3-23. Quorum; fine for non-attendance.

"Three (3) members of the board of supervisors shall constitute a quorum; and in case that number should not attend on the first day of any regular, adjourned or special meeting, the sheriff may adjourn the meeting from day to day until a quorum is present. A member failing to attend any meeting, having notice thereof, shall be fined five dollars ($5.00) per day for each day he may be absent, for which the clerk shall enter judgment nisi; and unless a sufficient excuse be made at the next meeting of the board, execution shall issue for the fine, which shall be paid into the county treasury. No allowance shall be made and no warrants shall be issued to such member until the fine and all costs are paid."

Miss. Code Ann. §19-3-39

"§19-3-39. Supervisors are conservators of the peace.

"The members of the board of supervisors are conservators of the peace within their respective counties, and shall possess all the powers as such, which belong to, or are conferred on justices of the peace."

Miss. Code Ann. §19-3-40

"§19-3-40. Power of board to adopt, modify, alter, or repeal orders, resolutions or ordinances not inconsistent with law.

"(1) The board of supervisors of any county shall have the power to adopt any orders, resolutions or ordinances with respect to county affairs, property and finances, for which no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the state of Mississippi; and any such board shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided in subsection (2) of this section, the powers granted to boards of supervisors in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.

"Such orders, resolutions or ordinances shall apply countywide except when the governing authorities of any municipality situated within a county adopt any order, resolution or ordinance governing the same general subject matter. In such case the municipal order, resolution or ordinance governing the same general subject shall govern within the corporate limits of the municipality.

" (2) This section shall not authorize the board of supervisors to (a) levy taxes other than those authorized by statute or increase the levy of any authorized tax beyond statutorily established limits, (b) issue bonds

of any kind, (c) change the requirements, practices or procedures for county elections or establish any new elective office, (d) use any public funds, equipment, supplies or materials for any private purpose, (e) regulate common carrier railroads, (f) grant any donation, or (g) without prior legislative approval, regulate, directly or indirectly, the amount of rent charged for leasing private residential property in which the county does not have a property interest, unless such actions are specifically authorized by another statute or law of the State of Mississippi"

Miss. Code Ann, §19-3-51
"§19-3-51. Power of the board to subpoena witnesses and cite for contempt.

"The board of supervisors shall have power to subpoena witnesses in all matters coming under its jurisdiction and to fine and imprison any person for a contempt committed while they are in session, the fine not to exceed fifty dollars, and the imprisonment not to extend beyond the continuance of the term. The person so fined or imprisoned may appeal to the circuit court, as in other cases, from the order or judgment of the board, and such appeal shall operate as a supersedeas,"

Miss, Code Ann. §19-3-53.
"§19-3-53. Collection of Fines imposed by board.

"When a fine shall be imposed upon any person by the board of supervisors, by virtue of any provision of law, the board shall cause the person to be summoned to appear at a succeeding meeting to show cause why the judgment for such fine shall not be made final. If sufficient cause be not shown at the return day of the summons of the judgment shall be made final, with costs, and the clerk shall issue a capias pro finem therefor, as for fines in the circuit court, which shall be made returnable at the next regular meeting of the board. If good cause be shown, the board may set aside the fine, upon payment of costs. The clerk and sheriff shall be entitled to like fees, for services, as upon similar proceedings in the circuit court."

CONCLUSION - PRECISE RELIEFS SOUGHT
DEFENDANTS: STATE OF MISSISSIPPI:
AND ATTORNEY GENERAL AND
DISTRICT ATTORNEY CIRCUIT COURT DISTRICT ONE

WHEREFORE PREMISES CONSIDERED, This Court is requested to find:

(1) By issuing Order Granting Defendants Motion to Dismiss the Amended Complaint (as to them), trial court (in which there was no trial) committed reversible error in finding there was a failure to state a claim upon which relief could be granted and finding these defendants are immune from suit and liability both by the Eleventh Amendment to United States Constitution and Mississippi Code Annotated, §11-46-9, and in the assessment of court costs and reasonable attorney's fees in this civil action to plaintiff, THEREFORE THE COURT IS REQUESTED TO FIND AND ORDER:

A. The plaintiff is entitled to a reversal of the Order Granting Defendants' Motion to Dismiss the Amended Complaint (as to them).

B. There is no failure by plaintiff to state a claim upon which relief could be granted.

C. These defendants are not immune from suit and liability by either the Eleventh Amendment to the U. S. Constitution in a state court; or Mississippi Code Annotated §11-46-9 immunity or any type or degree of immunity.

D. Litigation Accountability Act of 1988, §11-55-5(4): Plaintiff has substantial justification for filing the Amended Complaint, and assessment of all costs incurred by these defendants to the plaintiff should be denied and reversed resulting in all costs incurred by plaintiff to be reimbursed therefor as specified (CP-326, 328) and assessed to these defendants and such other costs and time as will be certified and as will have been incurred by plaintiff since January 25, 1996, through to the conclusion of this civil action.

(2) See Exhibits BAR-1 - 16, Addendum for Exhibits, and the close of paragraph (l), page 15. Following items A. and B. are a part of service of process. By MRCP Rule 4, Summons, (c) (3) (B) and (C), plaintiff is entitled to be reimbursed as shown:

A. Order defendant attorney general to reimburse plaintiff $981.13 which is the cost incurred by plaintiff in service process when service of process by mail was not acknowledged by this defendant, Exhibits BAR-3 - 5, 10, 11, 14 - 16.

B. Order defendant district attorney Circuit Court District One to reimburse plaintiff $528.68 which is the cost incurred by plaintiff in serving process when service of process by mail was not acknowl-

edged by this defendant, Exhibit BAR-5, 12, 13;
AND TO FIND AND ORDER:

(3) Attorney General Opinion 266-D issued October 11, 1993 is manifestly wrong and without substantial support.

(4) In addition to the immediately foregoing item (3), issuing opinions is a duty of the executive department magistracy whereas the office of attorney general is a part of the judicial department and that this is a violation of the Mississippi Constitution, Article 1, Distribution of Powers, Section 1.

(5) That offices of attorney general and district attorney were created and continued in all four Mississippi Constitutions as a part of the judicial department.

(6) That action of the State of Mississippi through its legislative and executive departments in defining duties of the executive department magistracy to offices of attorney general and district attorney both of which are a part of the judicial department is in violation of the Mississippi Constitution, Article 1, Distribution of Powers, Section 1; and that, by the Constitution, these offices are able to perform only duties of the judicial department magistracy, and to declare all such statutes are unconstitutional.

(7) That action of the state of Mississippi, through its legislative and executive departments, removing the office of attorney general from the judicial department and placing that office as the third office of the executive department is not the proper way to accomplish this needed change.

(8) That in not taking action to correct the foregoing deficiencies, the office of attorney general and district attorney are in violation of oaths of office taken: 'to faithfully support the Mississippi Constitution' and: 'I will faithfully discharge the duties of the office upon which I am about to enter', and to order these defendants to keep the oath of office taken.

(9) That the proper way to change these offices from the judicial department to the executive department is to change the Mississippi Constitution which the Legislative, executive, and judicial departments cannot do; and that the Court order a Constitutional Convention (CP-537, 538) of the people as recommended (CP-322 - 324) to make the necessary changes to their Constitution.

(10) All actions leading to and the results thereof taken by the offices of attorney general and district attorney since November 1, 1890, which are in violation of the mandated absolute Distribution of Powers, Article 1, be declared unconstitutional and that such have no force and effect which shall include, but shall not be limited to the "so-called" Mississippi Tobacco Settlement, returning the money received there-

from to from whence it came and the three items in Item 5 Amended Complaint (CP-148, 149). (CP-527, 444).

(11) Funds budgeted and appropriated for the ordinary expenses of the judicial department were and are being used improperly to perform duties of the executive department whereas such funds were budgeted and appropriated for the ordinary expenses of the judicial department; and that the Court order the immediate discontinuance of any and all such actions and that the Court order all such funds so expended since November I, 1890, be recovered as they are an obligation or demand belonging to the public.

(12) The plaintiff was deprived of Constitutional Rights as well as the violation of constitutional rights as enumerated in the foregoing brief, plaintiff's pleadings which includes the constitutional right to prosecute the Amended Complaint through to and including a jury trial.

(13) That offices of attorney general and district attorney have in effect, by failure of the state to properly act, have had all the duties taken away and that all salary, benefits, and emoluments of persons in the offices of attorney general and district attorney be terminated with no delay whatsoever, and to provide for the recovery of such funds so expended in the offices of attorney general and district attorney since November 1, 1890.

(14) That provisions of Section 278 of the Constitution of 1890 were not completely complied with when the Code of 1892 was adopted, that being conforming the duties of the offices of attorney general, district attorney, and boards of supervisors as specified in the Code of 1880 to the mandated absolute Distribution of Powers, Article 1, of the Constitution of 1890.

(15) That plaintiff has not only the interest but the right to live in an environment where oaths of office are kept and the provisions of the Constitution and the laws of the state are obeyed voluntarily, or are strictly enforced.

(16) That the court grant such other reliefs as equity and good conscience deem advisable to the plaintiff.

These precise reliefs sought are extensive and severe, but conform to the provisions of the Mississippi Constitution.

CONCLUSION - PRECISE RELIEFS SOUGHT DEFENDANTS: PONTOTOC COUNTY, MISSISSIPPI BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK, COLLECTIVELY AND/OR INDIVIDUALLY ET ALL AND UNITED STATES FIDELITY AND GUARANTY COMPANY

WHEREFORE PREMISES CONSIDERED, This Court is requested to find:

(1) By issuing Order Granting Defendants' Motion for summary judgment, trial court, in which there was no trial, committed reversible error in finding a circuit court lacks jurisdiction over an appeal from a decision of a board of supervisors unless a Bill of Exceptions has been properly filed when there was no such appeal; and the Order Granting Summary Judgment and Dismissal of all claims against Pontotoc County Defendants, Individually and officially, and United States Fidelity and Guaranty Company for failure to present any genuine issues of Material fact as a matter of law, when there is no such valid law in Mississippi, this court is requested to find:

A. That plaintiff is entitled to a reversal of the order granting defendants' motion for summary judgment and dismissal as to both Pontotoc County and USF&G defendants.

B. That plaintiff has stated injuries done him pursuant to the Mississippi Constitution, Article 3, Bill of Rights, Section 24, Open Courts.

C. That injuries claimed have been substantiated by Exhibits presented and subsequent pleadings.

D. That Pontotoc County defendants have not kept oaths of office taken and as a result thereof have denied and violated plaintiff's constitutional rights as enumerated in the foregoing brief and plaintiff's pleadings in this civil action.

E. That plaintiff has the right to bring forth this civil action as granted and guaranteed by the Mississippi Constitution, Article 3, Bill of Rights, Section 24, Open Courts; and Section 25, Right to Prosecute.

F. That a bill of exceptions is not required as this civil action is not an appeal from a decision of a board of supervisors, but is an action to correct improbities in office.

G. That there is no valid law or governing law as to "genuine issues of material fact", "dismissal", or "summary judgment" either in the Mississippi Constitution or in the Annotated Code of Mississippi of 1972, as Amended.

H. That plaintiff is entitled to a default judgment as defendants have invoked and the court has granted these defendants' Motions based upon an invalid defense,

I. That plaintiff should be reimbursed by these defendants for all costs and time as specified (CP-325, 326, 328), first from defendants, then from bonds issued by USF&G (CP-303, 304) and for such additional costs and time as will be certified and as will have been incurred by plaintiff as to these defendants since January 25, 1996, to the conclusion of this civil action.

J. That Defendant Pontotoc County, Mississippi, pay its proportionate share of costs (CP-327) on the same basis as its voting strength in the Three Rivers Solid Waste Management Authority as shown (CP-281) or as subsequently revised if such has been done, or through insurance if any, or through Pontotoc County's governing body, or the bonds thereof.

(2) See Exhibits BAR-1 – 16, Addendum for Exhibits, and close of paragraph (l), page 15. Following items A - C are a part of service of process. By MRCP Rule 4, Summons, (c) (3) (B), (C), plaintiff is entitled to be reimbursed as shown:

A. Order defendant L. Benjamin, Supervisor, Second District, to reimburse plaintiff all costs ($141.32) incurred by plaintiff in service of process when service of process by mail was not acknowledged, Exhibits BAR-2, 8.

B. Order defendant R. Seale, Supervisor Pontotoc County, Fourth District, to reimburse plaintiff all costs ($141.32) incurred in service of process when service of process by mail was not acknowledged, Exhibits BAR-2, 10.

C. Order defendant C. Thomas, attorney for board of supervisors, to reimburse plaintiff for all costs ($339.18) incurred in service of process when service of process by mail was not acknowledged. Exhibits BAR-2, 9, 10.

AND TO FIND AND ORDER:

(3) That the process specified in Title 11, Civil Practice and Procedure, for appealing decisions of any board, commission or any other agency of government in Mississippi, to a circuit or chancery court, sitting as an appellate court, is a denial of the constitutional right of a trial by jury and is therefore unconstitutional.

(4) Legislative enactments and Rules of Court which do not include, recognize, or consider constitutional provisions are invalid and/or unconstitutional.

(5) That all officials appointed, Exhibit BAR-18, by boards of supervisors of Pontotoc County, a political subdivision of the state, take the Oath of Office, Section 268.

(6) That Pontotoc County's governing body and all County elected and appointed officials are subject to the mandated absolute Distribution of Powers, Article 1, of the Mississippi Constitution, as Pontotoc

County is a political subdivision of the State and in accordance with the oath of office taken.

(7) That order granting defendants Motion for Summary Judgment and dismissal debarred plaintiff from prosecuting the Amended Complaint through to a jury trial.

(8) The office of boards of supervisors was created and continued in all four Mississippi Constitutions as a part of the judicial department of government in Mississippi.

(9) That action of the state of Mississippi, by its legislative and executive departments in defining duties and powers of the legislative and executive magistracies to the offices of boards of supervisors, a part of the judicial department, in various Titles and Chapters of Mississippi Code Annotated of 1972, and all predecessor codes since November 1, 1890, is in violation of Mississippi Constitution, Article 1, Distribution of Powers, Section 1, and are unconstitutional.

(10) That provisions of Section 278 of the Constitution of 1890 as to county government were not complied with and that the proper way to restructure county government is not (CP-616) by actions of the legislative, judicial, or executive departments, but by the people only, and that this Court order a constitutional convention as recommended (CP-322 - 324, 537, 538) to make the necessary changes to their constitution.

(11) That all actions leading to the results thereof taken by defendant, board of supervisors, which are in violation of the constitutionally mandated absolute separation of powers, Article 1, Distribution of Powers, all the way back to November 1, 1890, be declared unconstitutional. (CP-444)

(12) That office of board of supervisors have in effect by failure of the State of Mississippi to properly act, have had all the duties taken away and that all salary, benefits, and emoluments of persons in the office since November 1, 1890, be terminated with no delay whatsoever, and to order recovery of all such funds expended since that date.

(13) That the plaintiff has not only the interest, but the constitutional right, to live in an environment where oaths of office taken are kept and constitutional provisions and laws of the state and local government are obeyed voluntarily, or are strictly enforced and to order these defendants to keep their oath of office.

(14) That the Court grant such other reliefs as equity and good conscience deem advisable.

The precise reliefs sought are extensive and severe, but conform to the provisions of the Mississippi Constitution.

PROPOSED ORDER TO CALL A CONSTITUTIONAL CONVENTION

In a nonpartisan election to be held in no less than ninety and no more than one-hundred-twenty days after conclusion of Civil Action No. 95-160R, delegates shall be elected to convene a constitutional convention. Candidates who are private persons and qualified electors of each state senate district shall qualify in the manner prescribed for independent candidates for the state senate for the district they are to represent.

The candidate receiving the greatest number of votes in each of these fifty-two districts shall be elected; and shall immediately and publicly take the following oath of office: "I, _____ , do solemnly affirm that I will represent all the residents of the state senate district equally; that the total value of monetary and in kind campaign expenses expended by myself and all others in my behalf does not exceed $12,500.00; and that such will be reported in writing to the convention before being seated thereat; that I will faithfully and openly discharge the duties prescribed in the order calling this constitutional convention and will abide by its rules of order and procedures.

Any elected delegate charged with exceeding the cap on campaign expenses shall be heard by other elected delegates to the convention who may determine if the campaign expense cap was exceeded by questionable spending of others in an attempt to disqualify such candidate, and if such be the case, the amount so spent shall not be considered in arriving at the total value spent by the candidate and all others in behalf of such candidate.

Expenditure of any value in excess of the cap on campaign expenditures shall of itself and at once vacate the office of such person and the candidate who received the next greatest number of votes in the district where such a vacancy exists shall be declared elected from that district and shall be seated at the convention. There shall be only one delegate from each state senate district. This same method shall be used in filling any vacancy which may exist during the convention.

Delegates to the convention shall convene within ten days after certification of election to organize by electing officers and to establish rules of order and procedures. The convention shall have the power to administer oaths and send for persons and papers.

The convention shall initially convene at the State Capitol Building in the City of Jackson, Mississippi; however the site of the convention may be moved to a similarly located facility upon approval of no less than thirty-two affirmative votes of the delegates.

No less than twenty-seven affirmative votes of delegates shall be required to be an act of the convention. Officers, delegates, and the

staff of the convention shall be paid only for the time spent in the execution of their duties as provided for in the estimate of expenses filed with Initiative Measure No. 1.

For continued absences or for any other valid reason, the office of any delegate or officer may be declared vacant by the affirmative votes of no less than thirty-five elected delegates. Staff members and employes of the convention shall serve at the pleasure of the officers of the convention.

The estimated total cost of the Constitutional Convention from the election of delegates until changes are made to the Code of Mississippi are distributed is $23,640,492 which shall be expended from funds drawn by warrant of the convention on the state treasury, from funds not appropriated for ordinary expenses of government, which shall be appropriated by the legislature.

All funds drawn from the treasury of the state shall be fully accounted for and those funds not expended shall be returned to the state treasury at the same time final accounting of funds is made.

The convention shall recommend a revised constitution for this state to correct the deficiencies in the current constitution and as otherwise determined by the convention except that all rights of the people and ethics provisions as contained in the current constitution shall not be diminished.

The complete revised constitution shall be published as a booklet and mailed or delivered to all households in the state and in no less than twenty-one and no more than twenty-eight days thereafter, an election shall be held for ratification of the revised constitution by the people. The required vote for ratification thereof shall be a simple majority of the qualified electors voting thereon.

The convention shall continue until a revised constitution is ratified or has been rejected a third time. The convention may adjourn only upon completion of all duties prescribed herein.

Those persons who are elected, appointed, employed, dealing with or under contract or agreement with departments, agencies, and functions of government in this state and all its political subdivisions and those who are eligible to receive or are receiving benefits as a result of service thereto shall be considered a part of government together with their spouse, business partners, parents, children, brothers and sisters shall not be considered private persons and there shall be any withdrawal or removal from any of these in an attempt to qualify as a delegate.

If any provision of this order shall be invalidated, the remaining provisions shall remain in full force and effect. This court shall provide for enforcement of this order.

The following are the statutes and other authorities cited in the Petition which are too voluminous to be quoted verbatim at this time in either the Petition or this Appendix, see pages 2 and 28 in the Petition:

Constitution of the United States
Voting Rights Act of 1965
Constitution of Mississippi of 1817
Constitution of Mississippi of 1832
Constitution of Mississippi of 1869
Constitution of Mississippi of 1890
Code of Mississippi of 1892
Annotated Code of Mississippi; and
Miss. Code Ann. §7-5-1 et seq. Attorney General
Miss. Code Ann. §7-7-1 et seq., Audit Department
Mississippi Executive Reorganization Act of 1989, Title 7, Chapter 17
Miss. Code Ann. Title 11, Civil Practices and Procedures Chapter 46, Immunity from Liability
Miss. Code Ann. Title 15, Limitation of Action, Chapter 1
Miss. Code Ann., Title 17, Local Government - Provisions Common to Counties and Municipalities
Miss. Code Ann. Title 19, Counties and County Officers
Miss. Code Ann. Title 23, Chapter 17, Voter Initiative
Miss. Code Ann. §25-31-1 et seq. District Attorney
Miss. Code Ann. Title 27, Chapter 109, Cruise Vessels, Gambling
Mississippi Rules of Civil Procedure
Mississippi Department of Archives and History, Call No. Z-1067
Shepard's Mississippi Citations

To justify petitioner's claims, the following listing of the various chapters of Titles 15, 17, and 19 are presented.

TITLE 15
LIMITATIONS OF ACTIONS

CHAP.		BEGINNING SECTION
1.	Limitation of Actions	15-1-1

TITLE 17
LOCAL GOVERNMENT–PROVISIONS COMMON TO COUNTIES AND MUNICIPALITIES

1.	Zoning, Planning and Subdivision Regulation	17-1-1
3.	Promotion of Trade, Conventions and Tourism	17-3-1

5. Jails, Waterworks and Other Improvements 17-5-1
7. Removal of Local Government in Emergencies 17-7-1
9. Lease of Mineral Lands Other Than Sixteen Section of Lieu Lands 17-9-1
11. Gulf Regional District Law 17-11-1
13. Interlocal Cooperation of Government Units 17-13-1
15. Human Resource Agencies 17-15-1
17. Solid Wastes Disposal 17-17-1
18. Mississippi Hazardous Waste Facility Siting Act of 1990 17-18-1
19. Appropriations to Planning and Development Districts 17-19-1
21. Finance and Taxation 17-21-1
23. Rural Fire Truck Acquisition Assistance Program 17-23-1

TITLE 19
COUNTIES AND COUNTY OFFICERS

CHAP. BEGINNING SECTION

1. County Boundaries 19-1-1
2. County Government Reorganization Act 19-2-1
3. Board of Supervisors 19-3-1
5. Health, Safety and Public Welfare 19-5-1
7. Property and Facilities 19-7-1
9. Finance and Taxation 19-9-1
11. County Budget 19-11-1
13. Contracts, Claims and Transactions of Business With Counties 19-13-1
15. Records and Recording 19-15-1
17. County Auditors 19-17-1
19. Constables 19-19-1
21. Coroners 19-21-1
23. County Attorneys 19-23-1
25. Sheriffs 19-25-1
27. Surveyors and Surveys 19-27-1
29. Local and Regional Rail Authorities 19-29-1

There appears to be no way the contents of the various chapters of Titles 17 and 19 can be construed to be of the judicial department magistracy.

Supreme Court, U.S.
FILED
APR 13 1999
CLERK

No. 98-1317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CARL ZIMMERMAN,

Petitioner,

v.

PONTOTOC COUNTY, MISSISSIPPI; BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY, ET AL.; UNITED STATES FIDELITY AND GUARANTY COMPANY; STATE OF MISSISSIPPI; ATTORNEY GENERAL AND DISTRICT ATTORNEY CIRCUIT COURT DISTRICT ONE,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PONTOTOC COUNTY RESPONDENTS' BRIEF IN OPPOSITION

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16pp

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of this Respondent's Brief in Opposition and in the Petition for Writ of Certiorari and its supplementation on page ii.

This brief in opposition is presented by counsel for what was known in the former proceedings as the "Pontotoc County Defendants" and are now referred to as the "Pontotoc County Respondents." They consist of the following parties:

Pontotoc County Mississippi
Pontotoc County Board of Supervisors
Pontotoc County Attorney and Clerk, Collectively and/or Individually

Term of Office – 1992 through 1995, Inclusive:
K. Herring, President and Member, First District
B.N. Simmons, Vice President and Member, Fifth District
L. Benjamin, Member, Second District
J. Pennington, Member, Third District
J. Roye, Member, Fourth District
C. Thomas, Attorney for Board,
Until September 28, 1992
P. Tutor, Attorney for Board, from October 1, 1992
R. Collums, Clerk of Board and as Chancery Clerk

Term of Office – 1988 through 1991, Inclusive
K. Anderson, President and Member, Third District
L. Benjamin, Member, Second District
K. Herring, Member, First District
J.R. Seale, Member, Fourth District
B.N. Simmons, Member, Fifth District
C. Thomas, Attorney for Board
R. Collums, Clerk of Board and as Chancery Clerk

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Herb v. Pitcairn, 324 U.S. 117 (1945) 7, 10

International Longshoreman's Ass'n v. Davis, 476 U.S. 380 (1986) 6, 10

Marshall v. Ladd, 131 U.S. App. 89, 19 L. Ed. 53 (1855) 8

Mississippi Insurance Guaranty Ass'n v. Harkins & Co., 652 So. 2d 732 (Miss. 1995) 8

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Mississippi Constitution Art. 6, Sec. 176	1, 9, 10, 11

The Pontotoc County Respondents, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Carl Zimmerman.

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the Mississippi Supreme Court sought to be reviewed by the Petitioner herein is an unpublished opinion, and is printed as appendix "A" to the Petitioner's Writ of Certiorari. The Order of the Mississippi Supreme Court refusing a rehearing is unreported and is printed as Exhibit "B" to said petition. The mandate issued from the Supreme Court of Mississippi is printed as Exhibit "C" to said petition.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a). These Respondents deny that the Supreme Court has jurisdiction over this matter as explained at I, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Miss. Code Ann. § 11-51-75.

The text of this provision is reproduced in the petition at App. M at p. 55.

Mississippi Constitution Art. 6, Sec. 176

The text of this provision is reproduced in the Petition at p. 22.

STATEMENT OF THE CASE

A. Proceedings Below

One June 13, 1995, the Petitioner in this cause, Carl Zimmerman, filed his complaint in the Circuit Court of Pontotoc County, Mississippi alleging various claims against the Pontotoc County Defendants, both related and unrelated to dispute over fees for garbage collection at his residence. (R p.0015). On October 30, 1995, the Circuit Court quashed process as to Mr. Zimmerman's complaint for his failure to properly serve process on some of the defendants. (R p.062).

On or about January 26, 1996, Zimmerman filed the Amended Complaint, and again asserted a panoply of claims against these defendants. (R p.063). The Pontotoc County Defendants answered the Amended Complaint on April 30, 1996. (R p. 329). The Pontotoc County Defendants, individually and officially, filed for summary judgment on January 8, 1997. (R p. 382). The trial court granted summary judgment to the Pontotoc County Defendants on May 2, 1997. (R p.628). Petitioner filed his Notice of Appeal on June 2, 1997. (R p. 630).

On September 17, 1998, the Mississippi Supreme Court issued its opinion affirming the trial court's decision and issued its mandate on December 3, 1998. The Petitioner submitted his Petition for Writ of Certiorari on February 12, 1999.

B. Statement of Facts

The following are the material facts alleged by the plaintiff to support his amended complaint. These facts were

assumed to be true for purposes of the Pontotoc County Defendants' Motion for Summary Judgment.

Zimmerman delivered a letter to the Pontotoc County Board of Supervisors, dated May 21, 1993, in which he stated that he did not plan to put out any garbage for pickup by the County at his residence. He therefore declined to pay the County's fee, enacted by law, for residential garbage pickup. (R p. 0388).

Pontotoc County continued to bill Zimmerman for residential garbage pickup, despite his May 21, 1993, letter. Fees accrued through October 1993, along with late charges continuing past that date, for a total of $49.20. (R pp. 075-76).

Pursuant to a letter dated November 1, 1993, Zimmerman stated that he would begin putting out garbage for pickup at his residence, and he began paying the fee for that garbage pick up. (R p. 389).

By letter dated December 31, 1994, Zimmerman requested a hearing to contest the amount of $47.10 being listed as past due on his account for garbage collection. He contended that he did not owe the fee because he had not placed any garbage out for pickup by the County. (R p. 390).

A hearing on the matter was held on February 28, 1995. After the hearing, the hearing officer, B.N. Simmons, determined that Zimmerman owed the $49.20 in question because he is a residential generator of solid waste. The decision cited its reliance on a Mississippi Attorney General's opinion. (R p. 391) (copy of opinion attached at Pet. App. "J").

On February 28, 1995, the Pontotoc County Board of Supervisors entered an Order confirming the hearing officer's decision. (Pet. App. "O").

Zimmerman did not take any appeal of the Board's decision pursuant to a Bill of Exceptions as required by Miss. Code Ann. § 11-51-75.

Instead, on June 13, 1995, Zimmerman filed suit in the Circuit Court of Pontotoc County, Mississippi alleging various claims against these defendants, both related and unrelated to the dispute over fees for garbage collection at his residence. On October 30, 1995, the Circuit Court quashed process as to Zimmerman's complaint for his failure to properly serve process on some of the defendants. (R p. 393).

On or about January 26, 1996, Zimmerman filed the Amended Complaint, and again asserted a panoply of claims against these defendants, both related and unrelated to his contention that he did not owe any solid waste collection fee for the period of May 1993 through October 1993.

This brief in opposition only addresses the Petitioner's claims and contentions as they relate to the Pontotoc County Respondents. As such, these Respondents will attempt to identify for the Court those specific issues. Although the Petition for Writ of Certiorari is fairly convoluted, as against these Respondents it is believed he has presented two questions for review.

(1) whether the Circuit Court lacked jurisdiction over the Amended Complaint; and

(2) whether the Circuit Court erred by granting the Pontotoc County Defendants and USF&G's summary judgment.

Both of these questions stem from the trial court's dismissal of the Pontotoc County Defendants as parties pursuant to a grant of summary judgment.

In so doing, the trial court held that it lacked jurisdiction over any claims asserted by Zimmerman arising out of the Board of Supervisors' February 28, 1995, decision requiring Zimmerman to pay the fees incurred for garbage collection services. The trial judge concluded that it lacked such jurisdiction based on Zimmerman's failure to file a bill of exceptions within ten (10) days of that decision pursuant to Miss. Code Ann. § 11-51-75. The Mississippi Supreme Court affirmed the trial judge's order in this respect.

Furthermore, the Petitioner has alleged three additional issues that he contends warrant this Court's review. Again, although convoluted, the Respondents will attempt to identify the three issues Zimmerman has raised:

(1) Zimmerman contends that Rule 56 of the Mississippi Rules of Civil Procedure (regarding summary judgment) is not contained in the Mississippi Constitution, nor is it contained in the Code of Mississippi, and as such, it was improper for the trial court to grant summary judgment on this basis;

(2) Zimmerman contends that as the Pontotoc County Board of Supervisors is allegedly contained in the judicial branch of

government, that it violated the Mississippi separation of powers doctrine by exercising executive and/or legislative acts; and

(3) Zimmerman contends that the Mississippi Supreme Court used a section of the Mississippi Constitution (Article 6, Section 176) which had been declared unconstitutional by a Federal Court in denying the relief requested in his lawsuit.

As for the reasons discussed below, the Supreme Court of the United States should deny the Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THIS CASE

No federal question was determined by the decision of the Mississippi Supreme Court in affirming the trial court's grant of summary judgment as to the Pontotoc County Respondents in this case so as to provide a jurisdictional basis for this Court's review. As pointed in *International Longshoreman's Ass'n v. Davis*, 476 U.S. 380, 387 (1986), this Court "has no authority to review state determinations of purely state law." Stated another way, the United States Supreme Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Ridgway v. Ridgway*, 454 U.S. 46 (1981). Moreover, it is well settled that where the judgment of a state court rests upon

two grounds, one of which is federal and the other nonfederal in character, this Court's jurisdiction fails if the non federal ground is independent of the federal ground and adequate to support the judgment. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). It is apparent from the language of the Mississippi Supreme Court in this case that the Court's decision was based *entirely* on Mississippi laws and statutes and its interpretation of the Mississippi Constitution.

Zimmerman complains that the trial court erred by holding that it lacked jurisdiction over any claims arising out of the Board of Supervisors' February 28, 1995, decision for failure to file a bill of exceptions within ten days of the decision pursuant to Miss. Code Ann. § 11-51-75. That code provision provides that

> [a]ny person aggrieved by a judgment or decision of the board of supervisors . . . may appeal within ten (10) days from the date of adjournment at which the session the board of supervisors rendered such a judgment or decision . . . .

See Miss. Code Ann. § 11-51-75. In affirming the trial court's ruling, the Mississippi Supreme Court held that

> where an aggrieved person fails to appeal the judgment, order, or decision of a board of supervisors . . . that such person is prohibited from collaterally attacking the judgment, order, or decision.

(Pet. App. "A"). Indeed, such has been the law in the State of Mississippi for some time. The Mississippi Supreme Court

noted "it has long been the law of this state that statutes limiting the time within which appeals may be taken are both mandatory and jurisdictional." (Pet. App. "A").

Accordingly, the decision on this issue by the trial court and its affirmance by the Mississippi Supreme Court is a determination of purely state law, and as such, this Court has no jurisdiction to sit in review of the same. The proper construction of state legislation being a question of local, and not federal law, the decision of a state court thereon is not subject to review by the Federal Supreme Court. *Marshall v. Ladd*, 131 U.S. App. 89, 19 L. Ed. 53 (1855).

The next issue the Petitioner seeks this Court to review is his contention that since Mississippi Rule of Civil Procedure 56 is not contained in the Mississippi Constitution or the Mississippi Code, that the trial judge erred in applying it to his case. Zimmerman states that he has "thoroughly researched" the words "genuine issues of material fact" and cannot find them in the Annotated Code of the Mississippi Index or the Mississippi Constitution. Nor, he contends, can he find the words "summary judgment" and "as a matter of law." (Pet. at 20).

Since the State of Mississippi adopted the rules of civil procedure in 1982, Rule 56 and the summary judgment procedure has been an important tool used in litigation of cases. Since its inception, the Mississippi Supreme Court has held that it comports with the Mississippi Constitution. *See Brown v. Credit Center, Inc.*, 444 So. 2d 358 (Miss. 1983); *Adams v. Fred Dollar Store of Batesville*, 497 So. 2d 1097 (Miss. 1986); *Mississippi Insurance Guaranty Ass'n v. Harkins & Co.*, 652 So. 2d 732 (Miss. 1995). Furthermore, the Mississippi Supreme Court in *Strantz v. Pinion*, 652 So.

2d 738 (Miss. 1995), held that the federal analysis of Federal Rule of Civil Procedure 56 is persuasive on interpreting Rule 56 of the Mississippi rules. In that vein, it goes without saying that federal courts have upheld the practice of summary judgment as Constitutional. *See generally Oglesby v. Terminal Transport Company, Inc.*, 543 F.2d 1111 (5th Cir. 1976).

It is clear that the Mississippi Supreme Court's interpretation of its civil procedure rules is a matter of pure state law and is therefore beyond the reach of the Supreme Court for such review. Moreover, even if it is considered that the decision of the Mississippi Supreme Court is contrary to decisions of the federal bench, it is apparent that the Mississippi Supreme Court's decision is based on an independent and adequate state ground. Accordingly, the Supreme Court has no jurisdiction to review this issue.

Zimmerman's next contention is that because the Pontotoc County Board of Supervisors is allegedly contained under the ambit of the judicial branch, it cannot exercise legislative or executive functions, e.g., the regulation and collection of garbage fees, without violating the separation of powers doctrine. To the contrary, the Mississippi Supreme Court has held that although qualifications for membership on a county board of supervisors are provided under the "Judiciary" hearing in the Mississippi Constitution (Art. 6, Sec. 176), this does not exclude supervisors from the exercise of legislative, executive or administrative functions. (Pet. App. "A"); *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987). The Mississippi Supreme Court held that the Pontotoc County Defendants had not violated the separation of powers doctrine. (Pet. App. "A"). Clearly, the Mississippi Supreme Court has interpreted its own constitutional strictures and have

concluded that the board of supervisors are indeed permitted to exercise legislative, executive and/or administrative functions. This decision is based squarely on its interpretation of the Mississippi Constitution. As such, not only is Zimmerman's claim without merit, the Supreme Court under *International Longshoreman* and *Herb*, lacks jurisdiction to review this determination.

Finally, Zimmerman makes one last attempt at creating an issue for this Court to review by arguing that the Mississippi Supreme Court utilized a section of the Mississippi Constitution, declared unconstitutional, to rule against him in this matter. The Petitioner, however, misconstrues the Mississippi Supreme Court's reference to Article 6, Section 176 in its opinion. Section 176 of the Mississippi Constitution concerns the qualifications for membership on a county board of supervisors. This section held that a supervisor was required to be a resident freeholder of the district and was required to own a certain value of real estate as determined by the legislature in order to qualify as a supervisor. This section was declared unconstitutional in violation of the Equal Protection Clause of the United States Constitution in *Williams v. Adams County Board of Elections*, 608 F. Supp. 599 (S. D. Miss. 1985).

However, the Court's reference to section 176 in its opinion in this case was simply to explain that the board of supervisors, as a branch of government, was contained under the heading "Judiciary" in the Mississippi Constitution. (Pet. App. "A"). That is, the Mississippi Supreme court was not involved in the application of this section, but merely indicated that the only references to county board of supervisors was contained under the Judiciary heading of the Mississippi Constitution. The Court went on to further state

that the Mississippi Constitution's "headings" were of little significance in the determination of what branch of government such a body fell under. Based on this, the Mississippi Supreme Court held that although the board of supervisors may be contained under the Judiciary heading, that did not preclude it from exercising legislative, executive or administrative functions. (Pet. App. "A"). Such a determination is wholly within the province of the Mississippi Supreme Court to make based on its interpretation of the Mississippi Constitution. The Mississippi Supreme Court did not apply the substantive provisions of Section 176. As such, the Petition has not stated a claim for the Supreme Court to review on this issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
APR 26 1999
OFFICE OF THE CLERK

No. 98-1317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CARL ZIMMERMAN — PETITIONER

V

PONTOTOC COUNTY, MISSISSIPPI; BOARD OF SUPERVISORS, THEIR ATTORNEY AND CLERK COLLECTIVELY AND/OR INDIVIDUALLY, ET AL.; UNITED STATES FIDELITY AND GUARANTY COMPANY; STATE OF MISSISSIPPI; ATTORNEY GENERAL; AND DISTRICT ATTORNEY CIRCUIT COURT DISTRICT ONE — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF TO PONTOTOC COUNTY RESPONDENTS' BRIEF IN OPPOSITION

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Petitioner, Pro se
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The following are referred to as "ET AL." in the caption: Pontotoc County, Mississippi, Board of Supervisors, their Attorney and Clerk collectively and/or individually et al.

Term of Office – 1992 through 1995 Inclusive
K. Herring, President and Member, First District
B. N. Simmons, Vice-President and Member, Fifth District
L. Benjamin, Member, Second District
J. Pennington, Member, Third District
J. Roye, Member, Fourth District
C. Thomas, Attorney for Board, Until September 28, 1992
P. Tutor, Attorney for Board, From October 1, 1992
R. Collums, Clerk of Board and as Chancery Clerk

Term of Office – 1988 through 1991, Inclusive
K. Anderson, President and Member, Third District
L. Benjamin, Member, Second District
K. Herring, Member, First District
J. R. Seale, Member, Fourth District
B. N. Simmons, Member, Fifth District
C. Thomas, Attorney for Board
R. Collums, Clerk for Board and as Chancery Clerk

RESPONSE OF PETITIONER

The Brief in Opposition to the Petition for Writ of Certiorari was mailed from Counsel Press, LLC, New York, N.Y., on April 13, 1999. The petitioner's zip code was in error which delayed receipt of petitioner's copies. After correction there was a further delay due to certfication asking for a receipt. The petitioner was not at home when the mailman came on Saturday, April 17, 1999. Every effort will be made to have petitioner's reply brief in the mail within the number of the additional days caused by the delays cited above. The clerk's office, Jose Maquigae, advised that such a mailing date should cause the reply brief to arrive well before the need date, currently estimated to be in the second week of May, 1999. There was no proof of service with Pontotoc County respondents' brief in opposition.

In response to new points raised in Brief of Pontotoc County Respondents in Opposition to Petition for Writ of Certiorari, these respondents stated court decisions claiming reasons the Supreme Court of the United States should deny the Petition. Petitioner does not believe a petition for Writ of Certorari such as that submitted, Case No. 98-1317, has ever been received and that petitioner has furnished more than adequate justification that the state court of last resort has so far departed from the accepted and usual course of judicial proceedings in the interpretation of the state Constitution and laws and has sanctioned such a departure by a lower court as to call for an exercise of the United States Supreme Courts' supervisory power.

The Statements of Facts raised by respondents is a continuation of misstating the true facts of the case which are shown on pp. 3-5 of the petition and of which, with the exception of Counts 13 and 14, are improbities in office having to do with Pontotoc County respondents. With the exception of the 6 items of Count 1, the remaining counts have to do with the exercise of legislative/executive functions of Pontotoc County respondents which are a part of the judicial department as evidenced in the first paragraph on p. 12 of the petition.

As to Constitutional Section 176 of Article 6, Judiciary, the first time this constitutional section was brought into the case was in the opinion of the Mississippi Supreme Court of September 17, 1998, p. 14, Appendix A. The opinion did not quote the provisions of this Section, therefore it was necessary to get a copy of it which is contained in only the bound edition of the Code of 1972. It was

obvious to petitioner that Section 176 was relative only to the qualifications to be a member of a board of supervisors and not a grant of power or mandated duties as is contained in Section 170.

This was not mentioned in the Petition for a rehearing as it was believed this would also be obvious to the Mississippi Supreme Court upon a rehearing of the case. That court's declaration that Section 176 did not preclude a board of supervisors from exercising legislative/executive functions evidences how far the Mississippi Supreme Court will go to continue the status quo they helped create.

In preparing the Petition, it was realized there may have been court decisions involving this section after those shown in the 1972 bound edition. It was found Section 176 had been declared unconstitutional in 1985, as is related on p. 22 of the petition, which was not available to the petitioner previously. The inclusion of this fact seems permissible under Rule 25.5.

The action of the eight members of the Mississippi Supreme Court in the Opinion of September 17, 1998, in a ruling against petitioner quoting a constitutional provision that had been declared unconstitutional by a federal court completely reverses who the beneficiaries of constitutional provisions should be, from the people to those govern.

Section 176 remains in the Mississippi Constitutional with the notation it had been declared unconstitutional by a federal court because in the general election of November 6, 1990, a constitutional amendment was placed on the ballot by the legislature to reduce the number of supervisors from 5 to a lesser quantity; repealing Section 176 was included as a part thereof by H.C.R. 75 without the notation it had been declared unconstitutional 5 years earlier. These two questions allowed only a single vote. The amendment was rejected by the people. Evidently the legislature did not want the people to be reminded it had been so declared years before. Repeal of Section 176 should have been put on the ballot as a single question, but this was not done. Had this been done, Section 176 could have been removed from the Constitution. The Supreme Court of Mississippi should not have quoted this Section in its opinion of September 17, 1998, as this Section does not legally exist any more.

The Brief in opposition to the Petition for Writ of Certorari does not recognize Constitutional Section 278, p. 8 of petition, which is unique to the Mississippi Constitution. It is written in the present tense and as such the requirement that all laws conform to the Con-

stitution includes all laws enacted prior to the adoption of the Constitution as well as all laws enacted after the Constitution was adopted.

The Mississippi Supreme Court decision, Dye v State Ex Rel Hale 507 So.2d 345 (Miss. 1987) declares:

> "Indeed, this court zealously defends its authority to make rules regulating procedures within the judicial branch free of restrictions of any statute, Newell v State 308 So.2d 76 (Miss. 1975); order adopting Rules of Civil Procedure, May 26, 1981; order adopting Mississippi Rules of Evidence, September 19, 1985."

This ignores Section 278 of the Mississippi Constitution that all laws are to conform to the Constitiution as Rules of Court are considered the same as laws, which can be enacted only by the legislature in Mississippi which is mandated in the absolute separation of Powers of Article 1, Distribution of Powers, Sections 1 and 2. This, then appears to be in violation of that article and as such is unconstitutional.

The Brief of Respondents in Opposition to the Petition for Writ of Certorari again addresses Miss. Code Ann. §11-51-75, which is responded to on p. 18 of the petition.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, and as stated in the Petition, the Supreme Court of the United States is respectfully requested to grant the Petition for Writ of Certorari.

Submitted and filed, this the 26th day of April, 1999.

RESPECTFULLY SUBMITTED:

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